

No. 11483

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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LARRY FINLEY and MIRIAM FINLEY,

Appellants,

vs.

MUSIC CORPORATION OF AMERICA, a corporation,  
H. E. BISHOP and LAWRENCE BARNETT,

Appellees,

and

MUSIC CORPORATION OF AMERICA, a corporation,  
H. E. BISHOP and LAWRENCE BARNETT,

Appellants,

vs.

LARRY FINLEY and MIRIAM FINLEY,

Appellees,

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## TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME IV

(Pages 993 to 1328, Inclusive)

Upon Appeals from the District Court of the United States  
for the Southern District of California,  
Central Division

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(Testimony of Lawrence Barnett)

Q. You are acquainted with the five affiliate corporations of Music Corporation of America, are you not?

A. I am not acquainted with them. I know their names.

Q. Well, they all operate as one unit, one entity, do they not? A. I wouldn't know that.

Q. Well, you have told us that you are an officer of one of the affiliate corporations; that is right, isn't it?

A. That's right.

Q. And that is the California Movie Corporation?

A. I don't know if it is California Movie Corporation. I think it is Movie Corporation. I am not sure of the title.

Q. As a matter of fact, you disregard the corporate entity, do you not, in the transaction of your business?

A. I don't understand your question.

Q. Let me withdraw the question and ask you: What, if any, duties do you perform for the California Movie Corporation?

A. I take care of hiring janitors for the building and [1160] seeing the building is kept up.

Q. What building is that, sir?

A. 9370 Burton Way.

Q. That is Music Corporation of America Building, isn't it?

A. The Music Corporation of America offices are there.

Q. Is there any office of the California Movie Corporation there? A. I wouldn't know.

Q. Well, where are the offices of the California Movie Corporation? A. I don't know.

(Testimony of Lawrence Barnett)

Q. Yet you are the secretary of the corporation, you tell us? A. That's right.

Q. As secretary your duties are hiring and firing of janitors; is that what you just told me?

A. That's correct.

Q. Do you have an assistant secretary, Mr. Barnett?

A. No.

Q. You named this morning, I believe, four booking agencies with which you are acquainted. You said, of course, Music Corporation of America, General Amusement Corporation, Frederick Brothers Agency, William Morris Agency, and then you said Moe Gail, I believe, as the last one. Now, Moe [1161] Gail, where is their place of business? A. New York City.

Q. That is just a new agency, isn't it? A. No.

Q. Isn't that an agency which handles only colored attractions?

A. I think they have some white attractions. I am not sure.

Q. Can you think of one white attraction that they have? If you can, will you please tell me now? [1162]

A. They have some singers' acts. I don't know the exact names of them.

Q. Tell me one white orchestra or band, Mr. Barnett. So that you will understand I don't know very much about music or musical entertainment and that, if I use the words "band and orchestra", I am using them synonymously, and correct me if the occasion should require. Will you do that? A. Right.

Q. Now then, does the Moe Gail represent one white orchestra? A. I don't know.

(Testimony of Lawrence Barnett)

Q. You said that you split commissions—with other agencies? A. Right.

Q. When did you split commission with the William Morris Agency, sir?

A. The last commission we sent them—this is our band department I am talking about—was the Artie Shaw in, I believe, October, November or December—October or November of this year.

Q. Well, Artie Shaw was then an M. C. A. band, wasn't it?

A. Artie Shaw is not a M. C. A. band. He has never signed a contract with M. C. A.

Q. You people are representing him, aren't you? [1163] A. We are booking him; yes.

Q. And he is under contract with no other agency that you know of?

A. Not that I know of, no other agency.

Q. And certainly he is not under contract to the William Morris Agency that you know, don't you?

A. I don't know the exact setup of that. He has to pay them certain monies until he can get his release from them.

Q. Is there trouble getting a release if an orchestra wants to get released from one of your agencies?

A. I imagine the agency is not anxious to release the orchestra.

Q. That is the only one you can tell me about there, and that is this Artie Shaw matter with William Morris Agency? A. No.

Q. Where did you book him into first?

A. You asked me another question. Do you want me to finish that?

(Testimony of Lawrence Barnett)

Q. I will come back to it in a minute. If you will, I would just like to clear up this Artie Shaw matter, and then I will come back to that. Where did you book him first that you had to split a commission with the William Morris Agency?

A. We booked him on a tour of one-nighters up around [1164] California and the Meadow Brook here in Los Angeles.

Q. That is the only occasion you can think of with reference to the William Morris Agency; is that true or untrue? A. No; it is untrue.

Q. Tell me another occasion, sir?

A. Well, Hal McIntyre.

Q. And when was that, sir?

A. I can't tell you exactly the dates. I think it was in '43. I am not positive on that.

Q. Some time in the year 1943. A. I believe.

Q. Would it be spring, summer, fall or winter? Could you help us that much?

A. I think it was in the summer time, spring or summer.

Q. What booking was that?

A. We booked the band on a tour of one-nighters.

Q. Who was representing Hal McIntyre at that time?

A. William Morris.

Q. Now, have you exhausted your list as far as you can now recall, sir? A. No.

Q. Tell me. A. Al Donahue.

Q. When was that, sir? [1165]

A. I believe that was in the same year, '43.

(Testimony of Lawrence Barnett)

Q. About the same time, or earlier or later?

A. I don't know the exact dates on that. We have records which I could produce and show you.

Q. By the way, do you recall whether that was a one-night engagement, too?

A. It was a one-night tour, and I believe we put him in the Aragon ballroom, if I am not mistaken. I am not sure of that.

Q. You mean the Aragon ballroom down at Ocean Park? A. Right.

Q. That is an account which you service is it?

A. No; Mr. Bishop services that account.

Q. By the way, tell me what are the duties of a salesman in addition to selling bands?

A. Well, it is a pretty broad question. In addition to selling bands, all of his duties are comprised in selling bands, counselling with the band and aiding them.

Q. I am talking, of course, of salesmen employed by the Music Corporation of America, and one of the 11 salesmen that work under you. You understand that question, don't you? A. Yes.

Q. I mean, I don't want to take salesmen generally, just that. In addition to selling bands what are their other [1166] duties?

A. They counsel and aid and advise the orchestra leaders.

Q. They have no other duties than that, is that true?

A. That is about the whole of it, I believe. Some of them might have some inter-office functions.

Q. By that, you mean?

A. Well, maybe takes care of hiring of the girls or something like that.



(Testimony of Lawrence Barnett)

Q. No; I was not thinking of that one. So, then, his duties are, first—and I think this would be first, wouldn't it—to sell the band; that is his primary duty?

A. Selling the bands, that takes in a very large scope.

Q. I will give you a chance on that. You sell the bands; and then, too, advise and counsel and aid the bands in their problems, is that it?

A. That is true.

Q. That, then, is the duties of a salesman as such, is that true?      A. Yes; that is true.

Q. Generally speaking, you are acquainted with the booking of the licensed booking agents, I take it; is that right, sir?      A. Right.

Q. So you know Warner Austin is a licensed agent, don't [1167] you?

A. I didn't know it until I heard it and looked it up in the book, the union book, the latest.

Q. So you found that he is?      A. Yes, sir.

Q. In addition to the other things which you perform, that you have told us about, aiding and counselling and advising the bands, you do other things to promote the general reputation and popularity of your bands, do you not?      A. That is right.

Q. For example, you have this program, the Coca Cola show, that you put on; that is right, is it?

A. Yes.

Q. And that is in order that they may have radio publicity for the band?      A. That is true.

Q. And wherever possible, you try to get them radio time; is that the correct way to say it, radio time?

A. Yes; that is correct.

(Testimony of Lawrence Barnett)

Q. Broadcasts, so that it has as great a coverage as possible for them? A. Correct.

Q. I am using the words correctly, sir? You help me, won't you?

A. You are doing very well. [1163]

Q. If you can get a coast-to-coast broadcast for them, why, that is what you are looking for, isn't it?

A. That is correct.

Q. And that is also true with your advertising matter; you send that out so that the ballroom operators will give the greatest publicity possible for the band?

A. That is right.

Q. So it will be published in the newspapers. On this Coca Cola program you supply them without request from anyone; or, in other words, you designate which band shall play on that at the particular time, don't you?

A. No.

Q. Well, what does happen then?

A. We submit a list of bands to the Coca Cola people and they decide which bands they want.

Q. Oh. You knew, of course, that Mr. Bishop was going down to San Diego to appear before the City Council, didn't you? A. Yes.

Q. He discussed that with you? A. Yes.

Q. And you recall, do you not, that Mr. Finley talked with you about the King Sisters?

A. No; I don't remember.

Q. Well, now, you remember the fact of him talking to [1169] you about the King Sisters, don't you?

A. No.

(Testimony of Lawrence Barnett)

Q. No memory on it at all?

A. No. We might have mentioned the King Sisters' name at some time; but I don't remember the exact conversation at this time.

Q. Do you remember something about he being offered a booking and the King Sisters was available on the 3rd or 4th of February?

A. Yes; I remember that.

Q. You remember your discussion with Mr. Finley of that matter, don't you?      A. No.

Q. Did you discuss that with any other person?

A. I probably discussed it with Mr. Later and Mr. Bishop.

Q. Do you recall a conversation with Mr. Ken Later in which Mr. Ken Later told you that he had made a confirmed booking, a confirmed booking of the King Sisters with Larry Finley?      A. No.

Q. You have no memory of that now?      A. No.

Q. Did Mr. Later tell you that?      A. No.

Q. Did you tell Mr. Bishop to get on the telephone and [1170] submit the King Sisters to Dailard?

A. I turned over Mr. Bishop's memo to—pardon me. I turned over Mr. Ken Later's memo to Mr. Bishop, and I imagine he would have gotten on the telephone.

Q. Did you tell him to do that?

A. I didn't tell him to do that. I said, "Here's a submission. Go and submit it to Wayne Dailard."

Q. Tell me when was the first time that you talked with Mr. Finley, sir?

A. I believe it was the latter part of September or the first of October.



(Testimony of Lawrence Barnett)

Q. And where was that, sir?

A. In our office. At that time our band department was at 9370 Burton Way.

Q. And who else was present, sir?

A. Hal Howard, Mr. Finley and myself.

Q. Was there a conversation on that occasion?

A. Yes.

Q. What was said?

A. I believe I told most of that this morning to Mr. Warne. I told you that Mr. Finley came in, Mr. Hal Howard introduced him to me. He said he was thinking of taking over Mission Beach Ballroom, he was going to bid on it, and he had very fine political connections there and he thought he would get the ballroom. [1171]

I told him that we had a contract with Wayne Dailard which gave Dailard first refusal of all bands. And I talked to him about going to Oakland; that I thought he could make more money in Oakland; and also, we talked about the Burbank situation.

Q. You told him you would furnish him bands if he opened in Oakland, didn't you? A. Yes.

Q. You told him that if he put up a ballroom in Burbank you would furnish him with bands, too, didn't you? A. Right.

Q. But that if he opened up down there, or if he got the bid down there at Mission Beach, that you could not give him any? A. I didn't say that.

Q. You couldn't give him any unless Dailard turned them down? A. That is correct.

(Testimony of Lawrence Barnett)

Q. And you never knew Dailard to turn down a band, did you?

A. Well, I wouldn't know. He might have turned some bands down. I don't know. Mr. Bishop handled the account. I didn't submit them.

Q. You never even heard of one, though, did you?

A. I don't know any offhand, no. [1172]

Q. You know that Music Corporation of America furnished him bands at Casino Gardens, too, don't you?

A. Furnished who?

Q. While Mr. Finley was at the Casino Gardens?

A. Yes; we sold Mr. Finley bands right at the Casino Gardens.

Q. Now then, when was the next time you saw Mr. Finley?

A. I believe the next time I saw him was the Copper Room lunch.

Q. Well, didn't you see him in the office before you went over there?

A. I saw him for a few minutes, yes, in the office, and we talked a little.

Q. Who else was present on that occasion?

A. Billy McDonald, Larry Finley, Hal Howard came in and out on the conversation, and myself.

Q. All right. Tell me what was said then?

A. We talked to Mr. Finley. He had already obtained the lease for Mission Beach ballroom. He talked about getting bands. I again told him about our contract with Mr. Dailard. And I believe we talked a little bit about the Trianon ballroom and talked about a couple of bands for that. We talked about going to the bands direct, which I said was all right with us.

(Testimony of Lawrence Barnett)

Q. When he wanted to go and talk with Jan Garber why [1173] did you tell him not to?

A. I didn't tell him not to.

Q. What did you say to him?

A. I don't remember that even being discussed.

Q. You have forgotten that? A. No.

Q. You furnished Mr. Finley bands, have you, for use down there at the Trianon ballroom?

A. I believe we furnished one band, Paul Martin.

Q. Can't you think of any others?

A. None that I know of.

Q. Have you now told us all of the conversation which occurred over in your office—the word “over” should not be in there—in your office prior to going to the Copper Room?

A. I don't know which transpired in the office and which transpired at the Copper Room.

Q. Oh, by the way, this may possibly help you, or at least it will help me. In your office was there a conversation there concerning a band for his opening at Mission Beach?

A. I believe I testified that Mr. Finley did not know when his opening would be when he talked to us. He wasn't sure; they were decorating the ballroom, painting the ballroom, and he had a lot of things to do to the ballroom. He [1174] didn't know what date it would open.

Q. Can you tell me the date of this conversation with you at your office, sir?

A. I think it was the latter part of December or the first of January. I don't know the exact date.

(Testimony of Lawrence Barnett)

Q. Now then, what else was said, if anything, before leaving your office, sir?

A. I can't remember what was said before I left the office. I mean it was a conversation that took place in both spots.

Q. You have given us all of the conversation that took place on both occasions, the occasion in your office and while you were at the Copper Room, is that right?

A. I have given you all the conversation I can remember. There probably was more conversation.

Q. Did he come back to your office after the lunch?

A. I believe he did. I am not sure of that.

Q. Can you recall anything that was said on that occasion, sir?

A. I don't think he went into my office after that luncheon. I believe he went down to see Hal Howard. I am not sure on that.

Q. How many times have you talked with Mr. Finley?

A. That is pretty hard to say. We have had telephone conversations. I have seen him at Casino Gardens. He has [1175] been in my office.

Q. All right; let us take—I can see your point that it would be difficult. Let us take, now then, in order, the next time you saw him or talked with Mr. Finley after the occasion which, so we will understand each other, we will call the Copper Kettle conversation which you have just told us about. The next one, sir?

A. The next talk that I remember, I think is the time Mr. Finley came into my office after Tommy Dorsey's opening at Casino Gardens.

(Testimony of Lawrence Barnett)

Q. And could you help us by fixing that date, sir?

A. I believe Dorsey opened approximately the end of May.

Q. And then it would be the early part of June?

A. I couldn't say. I mean it was either the latter part of May or the first part of June, or whether he came in the next day after I was out there—I don't remember the exact date.

Q. Did you see Mr. Finley when you were out at the Casino Gardens? A. Yes; I did.

Q. That would be the next time that you saw him?

A. No. He didn't talk to me out there.

Q. Oh, all right. Then, a day or so later he came into your office, is that true? [1176]

A. Mr. Howard brought him into my office. They had had a telephone conversation about coming in.

Q. Just you and Mr. Howard and Mr. Finley present, sir? A. Right.

Q. What was said then?

A. Mr. Finley told me that he had bought into the Casino Gardens and he wanted us to know that he wanted to do business with us down there, regardless of the situation in San Diego; it had no bearing on the Casino Gardens setup; he would be glad to do business with us. We should submit all the bands to him; that he was going to do the buying.

Q. Did you say something in reply to that?

A. Oh, yes; I submitted bands to him. I believe he talked about a few bands that day.



(Testimony of Lawrence Barnett)

Q. Do you recall what bands you submitted to him then?

A. No; I don't remember the exact names of the bands. We probably went over our list and he probably said he would like to have so and so. [1177]

Q. You had a list of bands which you produced and which you and Mr. Finley discussed?

A. That's right.

Q. That is the situation, is it? A. Right.

Q. And from that list of bands, why, he selected some of them that he wanted? A. That is possible.

Q. Now, is that your best memory?

A. That is my best memory. We talked about many bands. All of the operators that come into the office want the top bands and say they don't want the others.

Q. That is a natural thing for a ballroom operator, to want the best bands, isn't it? A. Yes, sir.

Q. Without it he is going to be a second-rater, isn't he? A. Not necessarily.

Q. He won't make as much money, will he?

A. That is not true, either.

Q. Still the fact is they want the—

A. Certain promoters won't take big bands, they don't want them.

Q. Now, the Palladium always turns down your best bands, do they? [1178] A. No, they don't.

Q. They play nothing but your top bands?

A. That is a question—I mean it is a hard question. You say "top bands." You have a question as to which is a top band and which is a medium band.

Q. Well, you know, you represent them all?

(Testimony of Lawrence Barnett)

Mr. Warne: Just a moment. I object to the question. It is a voluntary statement of counsel and wholly improper.

The Court: That is right.

Mr. Christensen: I don't mean it in that way.

Q. By Mr. Christensen: I mean, all of those you represent?

The Court: If you want to testify, you can take the stand, and then you can be cross-examined by counsel.

You will disregard that, ladies and gentlemen. That was not evidence, and it was an improper observation by counsel and he should not have made it.

Q. By Mr. Christensen: I mean, of those you do represent, Mr. Barnett, and I don't want you, particularly here, to differentiate between one and the other,—of those you do represent, the ballroom operators feel that some are better than the others, don't they?

A. Some do. There is great discrepancy. Some bands at one place will do better business than at another, and other bands will do good business there. Everybody works [1179] for his own.

Q. Well, of those you represent, you have an opinion as to which is a best band, which is a good band, and some which are medium; is that true or not?

A. No, I wouldn't say it in that way.

Q. You tell me how you would say it.

A. Well, I like some bands better than other bands. I feel some bands will do better than other bands. That is my own opinion. Sometimes I am wrong; a lot of times.

(Testimony of Lawrence Barnett)

Q. Now, have you now told me all of the conversation which occurred on that occasion, sir?

A. I don't know if it was all the conversation. It was all the conversation I can remember at the present moment.

Q. Do you recall that on that occasion—the occasion now when Mr. Howard brought him in and talked with you—do you recall that Mr. Finley seemed to be peeved because you had gone down and hadn't spoken to him?

A. Mr. Finley never said a word to me. He said it to Hal Howard. He came in with a big smile on his face.

Q. Well, did you talk to Mr. Finley and tell him you hadn't intended to—

A. I told him I thought he was high-hatting me. I walked through the ballroom, and he wouldn't even look at me.

Q. I see. Now, have you given us all the conversation?

A. I told you I can't remember all the conversation. [1180] That's all that I remember at the present moment.

Q. Now, when was your next conversation?

A. Oh, I can't remember. Maybe in a day, a week. I can't remember exactly what the next conversation was. I think probably the next one was when he asked to get a band for the Examiner benefit. I am not sure. There might have been a conversation in between.



(Testimony of Lawrence Barnett)

Q. As I remember that conversation, was that just a few days after this conversation that you have just related to us?

A. I don't remember whether it was a few days or a week. I could look it up, probably, and see when the Examiner benefit was.

Q. No, but could we say a short time thereafter?

A. It could be possible, yes.

Q. That, as I understand, was a—he was putting on a benefit for the Examiner?

A. I think the paper was putting it on.

Q. Or sponsored—pardon me?

A. I think the paper was putting it on.

Q. What part did he play in it?

A. I think he gave them the ballroom, and I think he helped give them attractions to publicize it, and he came in to ask for bands to make it much larger.

Q. It was some charity? [1181]

A. Yes, the paper—I think they were putting on these affairs at various places. They put on an affair at Slapsie-Maxie's and Ciro's, and they moved around, in trying to raise money for the war wounded.

Q. That was the occasion on which you gave him Carmen Cavallero?

A. I didn't give them to him. I asked Carmen Cavallero if he would go out and do it?

Q. He was one of your bands? A. Yes.

Q. You helped on that, at least? A. Yes.

Q. Can you tell me when was the next time?

A. I can't tell you what conversation took place the next time and next time. We talked at various times

(Testimony of Lawrence Barnett)

during the year. I remember Mr. Finley came in the office—he came in one time to show me his new car, and he took me over to the garage to show it to me and asked me to take a ride in it. I can't remember all the conversations as they transpired. If you can tell me other incidents, maybe I can remember.

Q. Well, did you go down to San Diego on any occasion and talk to Mr. Finley? A. No.

Q. Can you recall any other conversation you had with [1182] Mr. Finley?

A. Yes, I remember the Charlie Barnet—I think I talked to Mr. Finley a little bit about that.

Q. When was that, sir?

A. I don't remember the exact date when we were negotiating to sell Charlie Barnet there. We had an offer from Birnie Cohen, and Birnie Cohen confirmed it, and then Birnie Cohen called me up and told me he was sorry, Mr. Finley wouldn't let him go that much money for the band; and I think he might have talked to Mr. Howard about it, and I might have talked to Mr. Finley about it.

Q. You offered Charlie Barnet to play at the Casino Room? A. At the Casino Gardens, yes.

Q. And Mr. Finley wanted him also for the Mission Beach Ballroom?

A. Mr. Finley never talked to me about Charlie Barnet for the Mission Beach Ballroom.

Q. You know that Charlie Barnet did play at the Mission Beach Ballroom? A. Yes.

Q. Did you have anything to do with that booking?

A. Yes.

(Testimony of Lawrence Barnett)

Q. Did you make the contracts out?

A. No, but Mr. Barnet talked to me about it in New York [1183] City.

Q. You didn't have anything to do personally with the contracts?

A. No, I believe Mr. Bishop submitted the contracts.

Q. Did you have any part in the preparation of the contracts for the Tommy Dorsey booking, Mr. Barnet?

A. No, Mr. Bishop prepared them.

Q. You talked to Tommy Dorsey, though, while he was in Boston, shortly before he came out to play that engagement, didn't you?

A. I did not.

Q. I mean, by telephone?

A. No.

Q. Did you talk to him at all while he was in the East concerning that booking?

A. No.

Mr. Christensen: Thank you very much, Mr. Barnet.

#### Redirect Examination

By Mr. Warne:

Q. Just a couple more questions, if you don't mind.

A. O.K.

Q. First, with reference to these Negro orchestras or Negro bands, are there any of them that are considered among the top, so to speak, as a musical aggregation?

A. Yes. [1184]

Q. Are they top—or, rather, is there a top demand throughout the country for those bands?

A. Yes.

Q. Is that true of some of these bands handled by this—what was the name of it?

A. Moe Gail.

Q. Moe Gail?

A. Yes.

Q. Now, I believe I neglected to ask you this directly, if I may be permitted to. Did you ever have any con-

(Testimony of Lawrence Barnett)

versation with Mr. Dailard directly relative to the booking of bands or the non-booking of bands into Mission Beach after Mr. Finley went in—      A. No.

Q. —and took it over?      A. No.

Q. Did you have any conversation with Mr. Dailard yourself directly relative to the booking of any bands in Pacific Square after Mr. Finley obtained the lease on Mission Beach?      A. No.

Q. You said something about the fact that some operators or managers of dance halls or ballrooms make more money without using these top name bands that you have been talking about?

A. That's right. [1185]

Q. Is that correct?      A. Correct.

Q. What kind of operations are those?

A. Well, some of them are very large operations?

Q. Are there any locally of that character?

A. Yes. The Zenda Ballroom here in Los Angeles.

Q. Do they use any of these so-called top name bands?      A. No.

Q. Do you sell bands or put bands into the Zenda?

A. No, we don't.

Q. What agencies do serve them?

A. I think they have had the same band in there for about, I don't know, maybe eight or nine years—Jack Dunn.

Q. What about any other ballrooms here, or dance halls?      A. In Los Angeles, you mean?

Q. Yes.      A. The Figueroa Ballroom.

Q. Do you play any bands in there?      A. No.

(Testimony of Lawrence Barnett)

Q. Now, throughout the country are there any places where, either now or in the past, your company has booked its orchestras that do not demand the so-called top name bands?

A. Yes, the El Patio Ballroom in San Francisco.

Q. Do you book orchestras in there?

A. We have booked orchestras in there. [1186]

Q. Do other agencies, if you know?

A. Yes, I believe they have.

Q. And what type or character of orchestras?

A. They are semi-name bands.

Q. I see. Now, did you have any discussions with any of the orchestra leaders under contract with M. C. A. relative to the merits of Pacific Square, as related to Mission Beach in San Diego, with reference to performance?

A. Did the conversations take place in San Diego?

Q. No, did you have any such conversations with any orchestra leaders?

A. I don't understand your question.

Q. All right. I didn't think you could. May I re-frame it, please?

Did you have any conversation with any band leader who is represented by your company relative to the respective merits of Pacific Square and Mission Beach as ballrooms in San Diego? A. One.

Q. Who? A. Charlie Barnet.

Q. Was that the conversation in New York, that you refer to? A. Yes.

Q. That is the one you referred to in the cross [1187] examination of Mr. Christensen also? A. Yes.



(Testimony of Lawrence Barnett)

Q. Will you relate it, please?

Mr. Christensen: To which we object as calling for hearsay.

The Court: You did open the door a little on it, I believe.

Mr. Christensen: I didn't ask for any conversation.

The Court: I know, but you opened the door. I will permit him to answer.

The Witness: A. I was in New York City and Mr. Charlie Barnet called me at our New York office, and told me Larry Finley was in town and taking him around, showing him the sights, and that he liked Finley very much, he was a very nice fellow, and would like to play for him in San Diego at Mission Beach, and he wanted to know if we had any objection.

I said, "No, if you want to play down there, it is all right." I said, "You have played for Pacific Square in the past. I think if you go to Mission Beach you might be making a mistake because you might be antagonizing the owner of Pacific Square."

Mr. Barnet said he didn't care, he would like to play for Larry Finley because he was a nice fellow. I said, "O.K."

Mr. Warne: No further questions. [1188]

#### Recross Examination

By Mr. Christensen:

Q. So he insisted on it anyhow, even though you advised against it?      A. I didn't advise against it.

Q. You told him he was making a mistake, didn't you?

A. Well, that isn't advising against it.

(Testimony of Lawrence Barnett)

Q. Hadn't Charlie Barnet played at Mission Beach before?

A. I don't know. I don't think so during the time Larry Finley had it. If he played there when Dailard had it, I would have to look up the records before I could tell you.

Q. You did not look up the records before you told him he was making a mistake in playing at Mission Beach, did you? A. No.

Q. You were afraid he would make Dailard mad, weren't you?

A. Wait a minute. Dailard didn't have Pacific Square at that time, so I wasn't afraid he would make Dailard mad.

Q. No, you thought he would make Finley mad if he played at Pacific Square?

A. No, Dailard didn't have anything to do with Pacific Square when Barnet played at Mission Beach.

Q. He didn't? A. No.

Q. When did he play at Mission Beach? [1189]

A. He played over Christmas and New Year's, and the first week of January.

Q. And Finley had the Mission Beach Ballroom at that time? A. That's right.

Q. And Dailard—or, Stutz had Pacific Square?

A. That is correct. Now you are right.

Q. It was Stutz now that you were worried about?

A. That's right.

(Testimony of Lawrence Barnett)

Q. Now, let's take up some of these ballrooms. The Zenda Ballroom, where is that, sir?

A. It is downtown here in Los Angeles. I don't know whether it is on 7th or 8th, one of those streets in there, near Figueroa.

Q. Have you ever been there?      A. Yes.

Q. Is that one of those you walk upstairs to?

A. That is correct.

Q. Do you know the capacity of it?

A. Well, I could give you my estimate of it.

Q. What is it?

A. I would say around 3,000 people.

Q. All right. That is more or less of an old folks' dance hall, isn't it?      A. I wouldn't say so. [1190]

Q. All right. You wouldn't call that a first-class ballroom, would you?

A. I think it is a very nice little ballroom.

Q. Is it comparable to the Trianon in San Diego?

A. I have never been in the Trianon in San Diego, so I wouldn't know.

Q. Now, this Figueroa Ballroom, where is that?

A. That is on Figueroa.

Q. Where?

A. I think it is down past Washington. I am not sure of the exact street.

Q. Is it near the corner of Figueroa and Washington?

A. I don't know if it is Washington. It might be Pico. I am not sure. It is down on Figueroa.

Q. Have you been there?      A. Yes.



(Testimony of Lawrence Barnett)

Q. Would you book Tommy Dorsey into the Zenda Ballroom? A. No.

Q. Or Xavier Cugat? A. No.

Q. Or Harry James?

A. I wouldn't book it. If the band wanted to play there, he could play it.

Q. Now, the same thing with reference to the Figueroa Ballroom. Would you put any of those bands in there? [1191] A. I wouldn't do it, no.

Q. What band is over there at the Figueroa Ballroom? A. Pete Pontrielli.

Q. Has he been there very long?

A. I think he has been there quite a while, yes.

Q. It is a house band, isn't it?

A. I think he owns the ballroom, too. I am not sure.

Q. Another one you mentioned was the El Patio in San Francisco. Where is that located?

A. That is on Market Street.

A. I wouldn't do it, no.

Q. What band is over there at the Figueroa Ballroom?

A. Pete Pontrielli.

Q. Has he been there very long?

A. I think he has been there quite a while, yes.

Q. It is a house band, isn't it?

A. I think he owns the ballroom, too. I am not sure.

Q. Another one you mentioned was the El Patio in San Francisco. Where is that located?

A. That is on Market Street.

Q. Where?

A. I don't know the exact address, but it is on Market. It is downtown, in the heart of town.

(Testimony of Lawrence Barnett)

Q. Do you know near where?

A. I don't know the cross streets there. I think it is Van Ness. I am not sure.

Q. That would be up near the Civic Center, if I am correct?

A. A. Correct.

Q. Is that a second-floor ballroom?

A. It is a second-floor ballroom, yes, you go up the stairs, and a very nice ballroom.

Q. That, you say, would book semi-name bands; is that right?

A. That's right. [1192]

Q. A semi-name band is one which is known locally or in particular territory, isn't it?

A. No, a semi-name band can be known across the country and still be semi-name.

Q. What would be the difference, sir?

A. Well, we are going into a tough thing. What do you mean, what would be the difference?

Q. Between a semi-name band which is known across the country, and a name band?

A. Well, Bernie Cummins is known across the country and is a semi-name band, in my opinion.

Q. You have given me an illustration instead of an answer. Could you give me an answer?

A. Then I will take Bernie Cummins, and I say a name that is known across the country and still isn't a top name band.

Q. Now, I would like to have you tell me the difference between a semi-name band known throughout the country and a name band.

A. Well, I don't know where the semi-name stops and the name starts. That is pretty hard to tell you, where

(Testimony of Lawrence Barnett)

the name starts. I might have an opinion on a band, and you might have an opinion on a band, and you might think it a top name and I might think it is a semi-name band. Everybody's opinion is different on that. The orchestra leader might think he is a top name band. [1193]

Q. Well, then we take it in the order of name bands, semi-name bands, and no-name bands?

A. There might be some more categories than that. I don't think you can put it in three categories.

Q. What would be the fourth?

A. I could say a little-name band, a medium-name band, and a little bigger name band, and a top name band. Those may be four categories. It is hard to say where the categories stop and start.

Q. The name bands are those which have gotten publicity and made a name for themselves nationally; isn't that right?

A. That is not right.

Q. What else?

A. The name band is a very large category. A band can be a name band here in Los Angeles and may not be a name band in other sections of the country, and they may not know him in other sections.

Q. Well, Tommy Dorsey is considered a name band? You do consider him a name band?

A. I certainly do.

Q. Why do you consider—

A. I would say he is a top name band.

Q. Why do you consider him a top name band?

A. He has a name attached to an organized orchestra; he makes records; he does very big grosses at the box offices; [1194] he is known from coast to coast; he has made pictures; there is a big demand for him.

(Testimony of Lawrence Barnett)

Q. Now, Jimmy Dorsey is in the same class, isn't he?

A. He is a big name band, like Tommy Dorsey.

Q. As a matter of fact, they even get write-ups in national magazines, don't they?

A. That's right.

Q. It is one of the things that contributes to their being one of these name bands, is it not?

A. It could contribute to it.

Q. The advertising that they get?

A. To those two bands you are talking about?

Q. That is true with all your name bands, isn't it?

A. No, some bands get national publicity and they are still just known in Los Angeles.

Q. What would you say makes—I will withdraw that, and ask you: you consider Xavier Cugat as a name band?

A. I class him in the same class as Tommy Dorsey.

Q. What is it that makes him a name band?

A. The same qualifications I gave for Tommy Dorsey.

Q. Now, is Harry James a name band?

A. I would say a top name band.

Q. Now, what are the qualifications that make him a name band?

A. Well, the same qualifications I gave for Tommy [1195] Dorsey.

Q. Well, now, Benny Goodman is a name band, isn't he?

A. He is a top name band.

Q. The same qualifications, is it?

A. Right.

Q. In other words, they are known from coast to coast, and you mention the name and everybody knows it?

A. Practically every one knows Benny Goodman that is acquainted with orchestras.

(Testimony of Lawrence Barnett)

Q. Now, Charlie Barnet, you consider him a name band?  
A. I say a top band.

Q. And the same qualifications, he is just known from coast to coast, isn't he?  
A. That's right.

Q. And Jan Savitt would be another illustration, wouldn't he?  
A. He is a top name band.

Q. For the same reasons?  
A. It is possible, yes.

Mr. Christensen: All right. Thank you very much, Mr. Barnett.

### Redirect Examination.

By Mr. Warne:

Q. Just one question, I believe. You answered the question to Mr. Christensen that you would not book Harry [1196] James or Tommy Dorsey into the Zenda Ballroom. Tell us why you wouldn't book them into the Zenda Ballroom?

A. Well, it would not be good business to book Harry James there.

Q. Good business for whom?

A. For the band leader. First of all, the ballrooms he mentioned have a limited capacity and can't pay the money that the Casino Gardens could pay, or the Palladium could pay, and it doesn't make sense for such a band to play down there when they could go somewhere else and make more money.

Q. In considering the relative position of Mission Beach and Pacific Square, in advising any band leader, would you consider the same matters that you have now referred to?

A. Well, they might be a little different, in my own personal opinion.



(Testimony of Lawrence Barnett)

Q. Give them, please.

A. One is that I would much prefer to play a band at Pacific Square than Mission Beach because I don't think the weather bothers the band as much at Pacific Square. Then the transportation is better to Pacific Square. People can walk over there, if they want to, and there are a lot of servicemen in the town at present who don't have cars, who walk to Pacific Square and go in the ballroom. Then Pacific Square has been playing name bands for the past four or five years, and they have established a place to play them, and Mission [1197] Beach has been playing cowboy bands, and I think the bands, in my opinion, can gross more money at Pacific Square than at Mission Beach.

Q. In coming to that conclusion are you concerned with what, relative to the bands that you represent?

A. I don't understand your question.

Q. Are you concerned with the welfare of the ballroom owner, or are you concerned with the welfare of the bands?

A. Concerned with the welfare of the bands, because if you book him in there and he doesn't do well, the owner doesn't want him back. If the band does well, the owner wants him back, and we create a demand for the band.

Mr. Warne: No further questions.

#### Recross Examination.

By Mr. Christensen:

Q. Well, going to a ballroom then is somewhat of a habit, is it? A. I don't think so.

Q. It would not make any difference, then, whether people have been going to the particular ballroom or not,

(Testimony of Lawrence Barnett)

but they would go wherever the best band was playing; is that right?

A. It might be; it could be possible. Sometimes with a big name band people will go to a ballroom they don't usually go to. But if you put them, say, in the Civic Auditorium, [1198] for instance, and people don't like it, people don't like to dance there, they won't go there.

Q. In other words, then, you create a place for them?

A. If it is an excellent place, you would have no trouble getting name bands, providing you built up a policy.

Q. You haven't been down to Mission Beach since Mr. Finley has had it, have you?

A. Yes, I was down there.

Q. When? A. About three weeks ago.

Q. What was the occasion of that?

A. I was down to San Diego.

Q. Well, how did you happen to go out to Mission Beach? A. Just went out and looked at it.

Q. Did you go in? A. No, it was locked up.

Q. Did you go there in the daytime?

A. I went there in the daytime; just went out and looked in the ballroom.

Q. So you looked in from the outside?

A. That's right.

Q. Now, other than that occasion three weeks ago, when were you last in San Diego?

A. September of 1944, I believe.

Mr. Christensen: That's all, sir. [1199]

Mr. Warne: No further questions.

The Court: We will take our recess, now, ladies and gentlemen, and remember the admonition and keep its terms inviolate.

(A short recess was taken.) [1200]

The Court: All present. Proceed.

Mr. Doherty: Mr. Dailard.

WAYNE DAILARD,

called as a witness by and on behalf of the defendants, having been previously duly sworn, was recalled and testified further as follows:

Further Direct Examination.

By Mr. Doherty:

Q. Mr. Dailard, since you were on the stand yesterday did you secure the books of record of the Mission Beach enterprises in San Diego? A. Yes, sir.

Q. Are those the books that were delivered here in court which I referred to this noon? A. Yes, sir.

Q. And those that are now being worked upon by the auditor representing the plaintiff at the table?

A. That is correct.

Q. I have already delivered to counsel for plaintiff a copy of the statement I am now showing to you. From what sources was the information contained in that statement that I have handed to you gathered?

A. It was taken from our books, the books of Mission Beach Enterprises.

Q. And who assembled the data for you? [1201]

A. Mr. Rothman, certified public accountant.

Q. And did he do so at your direction and under your instructions? A. That is correct, sir.

Q. Was that data taken from your books by him?

A. Yes, sir.

Q. And you believe it to be correct?

A. Yes, sir.



(Testimony of Wayne W. Dailard)

Q. Did you pay your income tax on the basis of the figures contained in that statement?

A. Yes, sir.

Mr. Christensen: Well, that is objected to as being immaterial.

The Court: Overruled. The answer will stand as given. Read it, Mr. Reporter.

(Answer read by the reporter.)

Mr. Doherty: I offer at this time, your Honor, as the defendants next exhibit in order—

Mr. Christensen: May it be received subject to further check, because we have not had the opportunity? I presently know of no objection.

Mr. Doherty: It is understood, your Honor, that Mr. Dailard will hold himself available for cross examination on this after counsel for the plaintiff and his auditor have a chance to check it against the records. [1202]

The Court: Very well.

Mr. Christensen: That is the understanding I have.

The Court: It will be conditionally marked as an exhibit, subject to whatever corrections are necessary to be made in the statement, if any.

Mr. Doherty: Yes, sir.

The Clerk: Defendants' Exhibit P.

(The document referred to was marked as Defendants' Exhibit P, and was received in evidence.)

Q. By Mr. Doherty: What is the item of \$153,797.55 on this exhibit?

A. It represents the income from the ballroom.

Q. For what year? A. For the year 1944.

Mr. Christensen: Forgive me, please, will you? Show me where you are reading, sir.

(Testimony of Wayne W. Dailard)

The Witness: Right here at the top of the page.

Mr. Christensen: Thank you.

The Court: Have you a copy of that statement? Is that the only one?

Mr. Christensen: Would you like to borrow mine?

The Court: No, no. I do not want yours.

Mr. Doherty: Here is one, your Honor.

Q. And immediately beneath that item is the total of \$128,540.52; and what does that represent? [1203]

A. That represents the total operating expenses.

Q. Against what operation?

A. Against the ballroom operation.

Q. And those two items I have had you mention are totals, the first being income and the second being expenditures of the ballroom as distinguished from the concessions?      A. That is correct, sir.

Q. And making up the total of \$128,540.52 were four different items. Will you please read off and tell us what they are?

A. We have salaries, \$12,751; we have supplies and expenses, \$4,603.10; advertising, \$17,078.14; music and entertainment costs, \$94,108.28.

Q. I will call your attention just to two of those items; first, advertising, \$17,078.14; what was included in that item as advertising, the type of advertising and the places put and what did it advertise?

A. Well, it advertised all the bands appearing at the Beach ballroom. It was comprised of newspapers, in some instances billboards, radio advertising, and posters for the lobby. That is the only items I can recall.

(Testimony of Wayne W. Dailard)

Q. Now, the next item, the large item there, is \$94,-108.28, music and entertainment costs. What type of music and entertainment was made up in that total? [1204]

A. That figure embraces the cost of bands and other artists appearing as attractions at the Mission Beach ballroom.

Q. That was the total spent for that purpose?

A. That is correct.

Q. What was your operating profit from the ballroom for that year? A. \$25,257.03.

Q. The rest of the figures on that Exhibit P from which you have been reading are confined to the operation of the concessions? A. That is correct, sir.

Q. Excepting certain general overhead?

A. That is correct.

Q. I will call your attention to one item down here under "overhead expenses": "Travel and entertainment for the year 1944." What was the total travel and entertainment expenses of the entire operation, both the ballroom and the concessions for that year?

A. \$290.00.

Q. And what was the net profit from the entire Mission Beach operation, both ballroom and concessions, for the year 1944? A. \$80,364.73.

Q. And I believe you have made the statement that on that you paid income taxes on the basis of those figures? [1205] A. That is right.

(Testimony of Wayne W. Dailard)

Mr. Doherty: Do you wish to cross examine now, Mr. Christensen, or after your auditor has checked the records?

Mr. Christensen: If I may defer, I would prefer it. And, Mr. Dailard, you are going to bring me certain of your advertising copies. Did you bring those?

The Witness: No; I haven't, Mr. Christensen.

Mr. Christensen: Please try and do it.

The Witness: Yes. We will have to subpoena those records from the newspapers. We have some on file but not the full complement.

Mr. Christensen: Do what you can, will you?

The Witness: I will.

Mr. Christensen: Thank you, sir. That is all now.

Mr. Doherty: I think that is all, Mr. Dailard. You will hold yourself subject to call. Could you, Mr. Christensen, indicate about when you would be ready for him, because Mr. Dailard has other matters to attend to, but we will get him here by telephone.

Mr. Christensen: If Mr. Dailard will give me his telephone number, I will advise him in time, if that is agreeable with you, sir.

Mr. Doherty: Will you give him your telephone number where you can be reached at your home?

(Mr. Christensen and the witness conferring privately.)  
[1206]

Mr. Warne: Shall I proceed, your Honor?

The Court: Yes.

Mr. Warne: Mr. Ross.

N. J. ROSS,

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: N. J. Ross, R-o-s-s.

Direct Examination.

By Mr. Warne:

Q. Mr. Ross, you are an attorney at law?

A. I am.

Q. Practicing in an office in this city? A. I am.

Q. A member of what firm?

A. Pacht, Pelton, Warne, Ross & Bernhard.

Q. You are the Ross of that firm, is that correct?

A. I am the Ross in that firm.

Q. In the year 1944 and in the year 1945 you and your firm were acting as attorneys for the Music Corporation of America? A. We were.

Q. Did you have a conversation with Mr. Desser? You know Mr. Desser? [1207] A. I do.

Q. What is his first name? A. Arthur.

Q. And the name of the firm is what, of which he is a member? A. Desser, Rau & Christensen.

Q. Did you have a conversation with Mr. Desser relative to Mr. Finley during the year 1945? A. I did.

Q. Do you know the date?

A. It was February the 2nd, 1945.

Q. Have you a recollection of that conversation?

A. I have.

Q. Was it in person; that is, did you personally meet. or by telephone? A. It was by telephone.



(Testimony of N. J. Ross)

Q. Relate it, please.

A. Mr. Desser called me on the date stated, told me that he represented Larry Finley who had gotten the lease on Mission Beach ballroom. He said Mr. Desser had been to—that Mr. Finley, rather, had been to M.C.A. to try and get some bands. He had been having a little trouble getting some information about them. Particularly, he had booked the King Sisters into the Mission Beach ballroom and found out that the King Sisters were being booked in a week ahead of [1208] the date that he wanted them, into the Pacific Square ballroom.

Arthur said to me that—

Q. That is Mr. Desser?

A. Mr. Desser said. "I know Jules Stein. I know if I told him about this, he would do something about it. He would not tolerate it, but I thought I would talk to you about it first. I would like to have you talk to Finley and get his story and help him out, if you can."

I told him I would find out what there was about it and report back to him.

Q. At that time did you make any memorandum?

A. I did.

Q. I show you Defendants' Exhibit N for identification and ask you what that document is?

A. That is the memorandum I sent immediately following the conversation I had with Mr. Desser.

Q. Reading that memorandum, if you will look at it, please, does that refresh your recollection as to any other subject matter of the conversation you had with Mr. Desser on the 2nd of February, 1945?

A. Yes.

(Testimony of N. J. Ross)

Q. What?

A. Desser said to me that if something was not done about it he was going to file suit against M.C.A. to restrain [1209] them from having a monopoly on the bands; that Finley had a lot of money invested in this thing and he was going to get bands for him if he had to file a suit to do it.

I told Desser I didn't see on what basis he could possibly claim that they had a monopoly, or that the matter he was discussing was something that could be the subject of a suit to restrain a monopoly. I told him that didn't make sense, but I would see what I could do about it, on the basis that he had called me as a friend, and I would talk to M.C.A. about it.

Q. Was that the sum of the conversation as you now recall it?

A. No; there is something else that is reflected by the memorandum. He told me that Ames Bishop—or, rather, that Wayne Dailard in making his bid for the ball-room before the City Council of San Diego had represented that he had an exclusive contract with M.C.A., by reason of which exclusive contract only he could bring attractions into San Diego. That was the prefatory statement he made about why he would file a suit to restrain monopoly if he did not get bands for Mission Beach for Finley. I incorporated that into this memorandum.

Q. What did you do with the memorandum?

A. I sent it to Larry Barnett.

Q. To any other officers of the company? [1210]

A. I sent copies of it to Ames Bishop and to Taft Schreiber.

(Testimony of N. J. Ross)

Q. Who is Taft Schreiber?

A. Taft Schreiber is the vice president of Music Corporation of America, one of them.

Mr. Warne: I renew my offer, if the court please, into evidence of the memorandum, Defendants' Exhibit N for identification.

Mr. Christensen: We offer the same objection.

The Court: Objection sustained.

Q. By Mr. Warne: Subsequently, Mr. Ross, did you have any other conversation with Mr. Desser about this same subject matter?      A. Yes, I did.

Q. Approximately when?

A. It was some time after I had had an opportunity to get some information on these facts that he had discussed with me, and it was about February—well, I had telephone conversations with him, probably, within the week; but I saw him again on February 15th, or saw him on February 15th.

Q. Following the sending of this memorandum to Mr. Barnett and the other persons named, did you talk to Mr. Barnett or to Mr. Bishop or anybody else at M.C.A.?

A. I talked both to Mr. Barnett and Mr. Bishop and Mr. Howard, Hal Howard. [1211]

Q. At their offices or at your office?

A. At their offices.

Q. And was there discussion of this request for bands and the claims that were asserted by Mr. Desser, as he had related to you and as you have related here?

A. Yes, there was.

Q. What was related to you at that time by Mr. Barnett?

(Testimony of N. J. Ross)

Mr. Christensen: To which we object as calling for hearsay.

The Court: That is the same subject matter, ladies and gentlemen, that I have already instructed you concerning heretofore. There are several defendants in the case, some of them persons, natural persons, and one corporate entity. One of those—two of them in fact, are those concerning whom the witness has just stated the conversation was had. You will consider it as to them, but unless it is connected up more specifically, it is not to be considered as to the other ones.

Mr. Warne: May I ask an additional foundational question?

Q. Who was present when you discussed the matter with Mr. Barnett?

A. Mr. Bishop and Mr. Howard.

Q. Relate the conversation there at that time?

A. I asked them to report to me in connection with the [1212] situation that Mr. Desser had presented to me. Mr. Bishop told me that he had been down to San Diego in an effort to help Dailard get the contract or the lease for Mission Beach. He said that—now, I don't remember whether Bishop said this or Barnett; they both talked at the same time. He told me that Dailard had been a valued customer of Music Corporation of America for many years; that he had used bands at a time when he was losing money in Mission Beach; that he had been established in the business in San Diego; he had gotten a very fine reputation as an operator of a ballroom, probably one of the finest in the country; he was a responsible per-



(Testimony of N. J. Ross)

son; he had money; they had no hesitancy in booking bands with him.

As to Finley, they had never heard of him before. He had some political background; he came into San Diego as a person who had decided to take over Mission Beach and through political influence had been able to get the bid away from Dailard, although Dailard's bid had been better than Finley's. Finley had never been connected with ballroom operations before.

They told me they didn't see how they could turn their backs on Dailard and give Finley bands, particularly in view of the fact that there were not many bands out here. There had been a time when motion picture studios were making a lot of pictures with bands in them, and when that cycle was [1213] the vogue there were a lot of the bands that came to the Coast. That was not a very popular thing at the moment and studios had stopped making band pictures. As a consequence of that, there were not too many bands on the Pacific Coast that could be available for dates of this kind.

They told me, also, that they had a contract with Dailard which gave him the first refusal on the bands that they would have available; that as far as bands that were available, Jan Garber had played in Mission Beach and the Pacific Square at repeated performances two or three times a year; Skinny Ennis had had to do the same thing before he went into the service; Bob Crosby had to do the same thing.

They said that if they wanted to, there were not enough bands here to give both Mission Beach and Pacific Square.



(Testimony of N. J. Ross)

In addition to that, they said they felt that Pacific Square and Mission Beach could not operate in the same period within the same area. Mission Beach had made a successful operation out of Western bands after Dailard had tried everything else and found out that the popular bands could not make money; that if he attempted to put popular bands in Mission Beach, it would compete with Pacific Square and neither one of them would make any money.

They could not conscientiously recommend two ball-rooms of the same type within the San Diego area, although that might not be true in another vicinity where they had a [1214] different type of population.

They discussed these things out with me. They told me that they did not know what they could do to help. I pointed out to them that we did not want any lawsuits if we could avoid it. They told me there was no solution; that even if Dailard turned down a band, that there wasn't any bands for Dailard to turn down so that Finley could have them.

I told them to send me the contract which they had referred to, the contracts with Dailard; I wanted to look at them.

Q. Subsequently was there shown to you or did you see this contract, Defendants' Exhibit F?

A. Yes; I saw it.

Q. Did you examine it? A. I did.

Q. Did you have any other conversation with Mr. Barnett and Mr. Bishop relative to that contract?

A. I did.

(Testimony of N. J. Ross)

Q. When with reference to the first conversation was your discussion with them as to the contract?

A. Probably within four or five days.

Q. Would you relate it, please?

Mr. Christensen: To which we object as hearsay and self-serving.

The Court: The same ruling as heretofore made. The [1215] objection is overruled.

A. I went up to see Mr. Barnett in Beverly Hills. I told him I had examined the contract; that if they could still get bands—that, as to the contract, I saw nothing in it that was wrong. I could understand why Dailard, who had been a valued customer for all these years and with whom they had had these dealings, was certainly entitled to normal consideration; but if they could get any bands or if there were any available, that they ought to try and find out what there was so that Finley might be able to get some bands.

Q. By Mr. Warne: By the way, upon any one of these occasions when you were there was there any discussion of the King Sisters?      A. Yes.

Q. Which one?

A. At this conversation with Barnett, Bishop, and Howard.

Q. Will you relate it, please?

A. I asked them about the King Sisters situation. I told them that Desser had mentioned that to me specifically and it seemed like some explanation was in order. And Bishop told me that the King Sisters had been—that Dailard had wanted the King Sisters when they were available and he booked them. He didn't know whether

(Testimony of N. J. Ross)

they were being sub- [1216] mitted to anybody else, and after he had completed the booking, he found out that Finley had called for them for the following week.

Q. Now, subsequently did you talk—I believe you said you did talk to Mr. Desser? A. Yes; I did.

Q. And what did you tell Mr. Desser?

A. I call Mr.—

Mr. Christensen: Would you lay a foundation?

Mr. Warne: Well, I believe he did before.

Q. About when was that?

A. Probably the day after I had my meeting with Barnett, Bishop and Howard.

Q. On the telephone?

A. I called him on the telephone and I told him what the result of my conversation was. I told him that it was a difficult thing to just pick up and have bands available, just because Finley came into the territory; that they did owe some allegiance to Dailard; and that that situation just could not be solved at the moment, but I would see what I could do.

He told me that he wanted me to talk to Finley, anyway, so that I could get the whole story first-hand. He wanted me to meet him. And I told him I would be glad to talk with him when Mr. Finley was available. [1217]

Q. Subsequently did you see or talk to Mr. Desser about this? A. I did.

Q. When?

A. On February the 15th Mr. Desser called me on the telephone.

(Testimony of N. J. Ross)

Q. Was there a telephone conversation then occurred?

A. There was a telephone conversation. He told me that Mr. Finley was in his office and he would like to come down to the room. We were both in the same building.

Q. And did they come down? A. They did.

Q. Did you have a conversation in the office?

A. Yes; I did.

Q. Relate it, please, assigning to each one what was stated in substance.

A. They both came in. Mr. Desser introduced me. He said, "Joe, I want Larry to tell you the whole story on this thing himself so you can have it first-hand."

And Mr. Finley proceeded to tell me that he had the right connections in San Diego and he got this Mission Beach thing and he was going to make it go. He had some great ideas in mind. He was going to make it a very successful operation; that he wanted to get a lot of big bands out there. He was not interested so much in how much the bands cost—[1218] or cost, rather, because the concessions, the popcorn and hot dogs or these other things that they sold in the ballroom and the Amusement Center would carry the load if only he could get attractions to bring them into the place.

He told me that Bishop had been down there to get or to support Dailard in his application; but he told me that there wasn't any opportunity of Dailard getting it because he was in San Diego and that was it.

He discussed also the fact that he had a different policy in mind with reference to the admission price. He wanted to charge only \$1.25 as top admission, he didn't care who the attraction was; that he could afford to charge that lit-



(Testimony of N. J. Ross)

tle because he would make up his profit from the other concessions around the Amusement Center.

As far as he was concerned, he only wanted to operate Saturdays and Sundays; that, to his mind, that was more profitable and he could forget about all the other time that they might have available.

We talked, too, about Casino Gardens. I don't know how that conversation came up.

I told him that I represented both Tommy and Jimmy Dorsey, who at that time owned the Casino Gardens ball-room; and he told me that he wanted to—he would like to get into that operation; said he had heard that they were looking to sell the lease. [1219]

I told him I didn't know anything about it; they were both in New York; I hadn't heard it. And either he or Desser suggested that if I would be good enough to send a wire to New York to Tommy or to Jimmy, to see whether there was any possible basis for buying into the enterprise, that he would like to do it. And Finley told me, he said, "You do this and we will all make a little money. I will see that you get a piece."

I told him that I was not interested in anything like that, but I would be glad to make the inquiry.

That, I think, concluded the conversation on that occasion.

Q. Did you send the wire?

A. I sent the wire that day.

Q. Did you get a reply?

A. I got a reply the following day.

Q. Did you communicate that to him?

A. I called Arthur Desser and told him that the ball-room is not available for a deal.



(Testimony of N. J. Ross)

Q. Was there any discussion on the occasion when Mr. Finley and Mr. Desser were in your office of Mr. Finley getting bands for some certain dates?

A. No; that occurred later. There was, however, one other matter in that conversation that I have not stated.

Q. All right; relate it. [1220]

A. Desser told me in this same conversation that he meant to get bands for Finley even if he had to file a lawsuit to get it, and that it certainly would not make sense, but they were going to file suit under the Sherman Anti-Trust Act.

I then discussed with him again the fact that I didn't think there was any basis for it; that it didn't make any sense. I was doing what I could to find out what the situation was, and that you just couldn't come in and cast aside a relationship such as M.C.A. had with Dailard, but that if he would be patient, perhaps something would work out.

Q. Was there a suggestion of getting some dates that Mr. Finley wanted? A. That occurred later.

Q. I see. Will you relate that, please, and how it occurred?

A. One or two days later, Desser called me and told me that Finley had submitted a list to him of different dates in April and May, of Saturday and Sunday dates in April and May on which he hadn't been able to make any arrangements for bands, and could I at least find out if bands would be available at that time.

I made a memorandum of the dates. It may have been that Finley came in with it or called me, but I know that [1221] pursuant to that list of dates, I then sent another memorandum on to M.C.A.

(Testimony of N. J. Ross)

Q. In the meantime, had you had any discussions with Mr. Barnett and Mr. Bishop about the situation there?

A. Yes, I had. I had told them—I had reported back to them my conversation with Desser and Finley, and still told them that if they could get some information on the situation, it might be helpful to let me know.

Q. I show you Defendants' O for identification and ask you what that document is?

A. This is a copy of the memorandum that I sent out to Larry Barnett on February the 20th.

Q. Does the memorandum there refresh your recollection as to any other matter of conversation either with Mr. Finley or Mr. Desser or Bishop and Barnett?

A. Well, it refreshes my recollection in this respect: That although I had talked to Barnett on these occasions and told him that if we could get bands, I would rather see them have some bands made available to Finley. He told me that he didn't see how that was possible because they could not now tell when bands would come in in the future, and they couldn't tell when the bands did come in who Dailard would take or who he would not; and they could not anticipate the itinerary of any of these bands at this moment. He knew that at this time, at the time I was discussing it with him, [1222] and within the few weeks immediately following that there were not any bands that Finley could have had, even if they had felt free to submit them to him without submitting them to Dailard first.

This, then, was a list of the bands which Desser had given me—

(Testimony of N. J. Ross)

Q. Bands?

A. A list of the dates, rather, that Desser had given me, which I submitted to Barnett and asked him to consider them and see what he could do.

Mr. Warne: I again offer, if the court please, Defendants' O for identification.

Mr. Christensen: I offer the same objection.

The Court: The same ruling, sustained.

Q. By Mr. Warne: Subsequently to that time did you have any conversation with Mr. Desser or with Mr. Finley before the lawsuit was filed?

A. Yes. I talked with Mr. Desser after the memorandum of February 20th was sent. I had seen him on one or two occasions in the building. I told him I hadn't any news for him yet, but if he would only be patient, why, something would be worked out.

Q. Something would be worked out; you were referring to what?

A. Well, worked out in the way of perhaps getting the [1223] bands for Mission Beach, doing something about the situation of the paucity of bands and the fact that Dailard had a first refusal commitment with M.C.A.

Q. Was there any other conversation before the lawsuit was filed?

A. There was none that I can recall, because two or three weeks, or about three weeks later, I left for New York.

Well, yes, there was one conversation. In one of the conversations—I think it was the one that I had with Finley and Desser—Finley told me that he had it on good authority that Ames Bishop was being paid off by Wayne Dailard. And I told him that if I—I couldn't believe

(Testimony of N. J. Ross)

such a situation to exist; and that certainly, that if such a situation existed, it would not be tolerated by the company or Mr. Stein or anybody; that I knew that Dailard and Wayne (Bishop) were friendly, others had told me, and I knew that Dailard—or, rather, Bishop took care of the San Diego account. That I would check that, because I was particularly interested in finding that out as to the condition of the company. And subsequently I did report back to Desser that there wasn't anything that I could find or anything from the information I had obtained which indicated such an arrangement or such a condition to exist.

Q. Did you make inquiry of Mr. Barnett in that regard? [1224]      A. I made inquiry of Mr. Barnett.

Q. And anyone else of the company, M.C.A.?

A. Mr. Bishop and Mr. Schreiber.

Q. Mr. Schreiber?      A. Yes.

Q. Was there any other information that you had available which might acquaint you with the fact, or possibly acquaint you with the fact of any so-called pay-off of Bishop?

A. I prepared Mr. Bishop's income tax returns for the past five years, and I knew no such sums had been reflected in it.

Q. Income tax returns to the Federal Government?

A. Federal Government and the State.

Q. Do you know Mr. Bernie Cohen?      A. I do.

Q. Are you also a member of the South of Tehachap-  
pee Golf aggregation?      A. I am.

(Testimony of N. J. Ross)

Q. Was there an occasion when you played golf at Hillcrest Country Club with Mr. Cohen, some week or so prior to the commencement of this trial?

A. It was on Saturday, January the 19th.

Q. Who played with you on that occasion?

A. Taft Schreiber and Harry Friedman. [1225]

Q. And Bernie Cohen and yourself, of course?

A. That is right; yes.

Q. Was Mr. Finley mentioned on any occasion during the time that you saw Mr. Bernie Cohen that day?

A. Yes; he was.

Q. Who else was present?

A. Just Mr. Cohen and myself.

Q. And where were you at the time?

A. I was having lunch in the grill room of the club.

Q. That is, the two of you were?      A. Yes.

Q. Relate the conversation, please?

Mr. Christensen: To which we object as hearsay and not a proper form of impeachment. He should state what it is.

The Court: In what respect? There are two ways to impeach a witness; one is by asking the specific matter that the witness concerning whom the particular impeachment is sought stated; the other is to ask him to state what was said.

Mr. Christensen: I was of the opinion that, in order to avoid the hearsay rule, it would be necessary to simply ask those questions for which a foundation has been laid.

The Court: Well, that is the better way, but it is not the sole way. The jury will have to make the comparison between the two statements, if they conflict. I think both ways are proper. [1226]



(Testimony of N. J. Ross)

Mr. Christensen: Very well, your Honor.

The Court: The better way is always to direct the witness' attention, especially where you have a transcript. That is the most secure way. It does not then depend upon the frailty of human thought, but you have the precise statement in the record and you can ask the other witness whether such and such a conversation occurred and he can give his version of it. But I do not know of any rule that makes that necessary. It is not the easiest way with which to follow impeaching evidence.

Mr. Warne: I realize that. It was with deliberation that I asked it this way, if I may be permitted.

The Court: Very well, overruled.

Q. By Mr. Warne: Relate the conversation.

A. Cohen said to me, "You know, I am out of Casino Gardens now."

I said, "Yes, I know that."

He said, "Joe, isn't there some way that I can help you in this lawsuit?"

I said, "Well, what can you do?"

He said, "Well, I want to testify." He said, "I want to come to the trial and testify for you if you need me." He said, "I am glad I am out of Casino Gardens. Finley is a phoney." He used some other language I would rather not repeat. He said, "All the time that I thought that he was [1227] going back to New York and being for me with the Dorseys, he was knocking me to the Dorseys. Lee Eastman, who is out here from New York, told me that he used to run me down in front of them; and if he is supposed to be a ballroom operator, then he don't know the business. If I spent as much money as he did out at Casino Gardens, I would have gone broke 15 years

(Testimony of N. J. Ross)

ago. But I want to do something about it if I can. Before, I couldn't say anything."

I said, "Well, I am not handling the trial and I will talk to Warne, or whoever it is, and see what the situation might be."

He says, "Well, if I can help, please let me know. I want to do whatever I can to help you in the trial."

And there wasn't any other conversation.

Q. After that you played golf?

A. After that we played golf.

Mr. Warne: You may cross examine. [1228]

### Cross Examination

By Mr. Christensen:

Q. You know that he did appear here and testify on behalf of the plaintiff? A. I was here.

Q. And you know he was asked if such a conversation took place? A. I know that.

Q. And you know he said no such conversation took place? A. He did. I know that.

Q. Now, Mr. Ross, on the occasion when you and Mr. Finley and Mr. Desser had a conversation in your office, and the date you fixed, I believe, is February 15th of 1945,—correct? A. That is correct.

Q. On that occasion did you say to Messrs. Finley and Desser that you don't trust Dailard?

A. I don't recall that I said anything like that.

Q. And that you don't trust Bishop?

A. I did not say that.

Q. Did you say that Dailard was no good?

A. I did not.

(Testimony of N. J. Ross)

Q. Did you say that there was something with reference to finances which had occurred while Mr. Dailard was connected [1229] with Collonade's in his management of the Casino Gardens, and you were going to sue him?

A. I did not.

Q. And did you say to them on that occasion that there was some tie-up between Bishop and Dailard?

A. I did not. That was said by Finley to me.

Mr. Christensen: That is all.

Mr. Warne: That is all. Jules Stein. Take the stand, Mr. Stein. You have been sworn.

### JULES STEIN,

called as a witness by and on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Warne:

Q. Mr. Stein, you have already testified that you were president of the Music Corporation of America and certain of the other corporations about which Mr. Christensen interrogated you as a plaintiffs' witness. Do you recall that fact? A. Yes.

Q. Now, these other corporations, which are termed—I believe you termed them at that time, or he did, affiliates, will you tell us generally what those corporations are, with reference to the subject-matter of their business, how they operate, and why? [1230]

A. They are either affiliates or subsidiaries, and the prime purpose for them was to get around the jurisdic-

(Testimony of Jules C. Stein)

tional problems that are involved in the business. For instance, the Music Corporation of America is licensed by the American Federation of Musicians. M.C.A. Artists is licensed by the Four A's. The Four A's refers to the Screen Actors Guild, the American Federation of Radio Artists, the American Guild of Variety Artists, and Actors Equity. The purpose of the separate corporations was so that we could, as closely as possible, keep the business in the respective corporations that are involved with the various guilds and unions concerned, so that in inter-jurisdictional disputes that might develop there would be no difficulty, because they are not all related, although they are members of the American Federation of Labor. It was primarily to avoid difficulty such as we see presently in the motion picture industry. They are separate corporations. There are separate accounting systems, and separate tax returns are filed.

Q. Now, this corporation of which Mr. Barnett is the secretary, that he doesn't know much about except that he hires the janitors, what about that?

A. That happens to be the Movie Corporation, which owns the building at 9370 Burton Way, in which the other corporations are tenants, and since it has no employees except [1231] perhaps the grounds keeper and perhaps the watchmen, it was purely a bookkeeping problem and Mr. Barnett was asked to be the secretary since he did the buying and since it is necessary to have corporate officers for federal and tax purposes.

Q. That company does not engage in any branch of the amusement business, as such?

A. Definitely not.

(Testimony of Jules C. Stein)

Q. When was Music Corporation of America formed, as a corporation? A. Organized in 1924.

Prior to that time had you been personally engaged in the booking business? A. Yes.

Q. Booking what types of entertainment?

A. Orchestras.

Q. Also known as bands, I believe you explained?

A. Right.

Q. That is, in later years they have become known as bands rather than orchestras?

A. It is rather a synonymous term.

Q. When you first started in the booking business, under what name did you start?

A. Well, originally under my own name.

Q. Subsequently, when you organized the corporation, [1232] did you first take the name of Music Corporation of America?

A. No, there was a prior company called Ernie Young, which later went out of business, and in 1924 M.C.A. was formed, the present company.

Q. At that time were you familiar with the fact that there were other booking agencies in the business of booking bands and other forms of entertainment?

A. Yes.

Q. Can you name some of them?

A. Well, some of the outstanding ones were Benson of Chicago, Meyer Davis of Washington, Philadelphia, New York and Boston; Emil Coleman in New York; and a firm by the name of National Attractions.

Q. And was there such a firm as William Morris?

A. The William Morris Agency was the outstanding agency of the business, yes.



(Testimony of Jules C. Stein)

Q. Is that the same William Morris Agency that still is in existence?      A. Yes, the same one.

Q. It was the outstanding agency then, and at the present time how does it rank?

A. It is still the outstanding agency in some forms of the amusement business, or branches, I should say, of the amusement business.

Q. When you started out, I take it, you secured [1233] employment contracts to represent band leaders or agency contracts to represent band leaders, somewhat after the fashion they do now?

A. Very similar to the present contractual form.

Q. At that time had the American Federation of Musicians prescribed a form which was required?

A. There was no form at that time. That developed later, and I am not sure, but I would say offhand about ten years ago, along with the licensing of agencies.

Q. Subsequently, I take it, you had a list of bands that you represented?      A. Right.

Q. Your office, when you started this business, was where?      A. Originally Chicago, Illinois.

Q. About when was it that you moved to some other place, or enlarged?

A. Well, I think the New York offices were opened about 1927 or '28, which was followed by our offices here in the Oviatt Building in Los Angeles.

Q. About when?

A. I am inclined to believe that was in the early '30s.

(Testimony of Jules C. Stein)

Q. Were there any other places in which offices were opened up?

A. Yes; the next office, I believe, was in Dallas, Texas, [1234] some few years later; then Cleveland; and the Detroit office was just recently opened.

Q. Now, in the meantime, as you opened these offices—well, may I ask you this: Did other booking agencies have offices in some of these other cities?

A. That developed about the same time, and somewhat followed the development of our business, and particularly as the one-night stands were developed, others came in with similar orchestras and followed in this unique plan of playing bands, which was new, in the dance area. That is, when the popularity of dance bands developed through radio and records, others, offices like William Morris, who had offices in places ahead of us like in New York, Chicago and here, opened offices, and agencies like General Amusement opened up offices at these various points; and Frederick Brothers. As a matter of fact, General Amusement Company, I think, have an office in Cincinnati at the present time, and we do not have one there.

Q. The William Morris office originally had an office in New York?

A. Yes. I think they are the oldest agency now existing in the agency business. They were founded by William Morris, Senior, who died some ten or fifteen years ago.

Q. And there is a son, William Morris? [1235]

A. William Morris, Junior, yes.

Q. Now, then, at any time, or, when you got into the band-booking business—we will call it “band-booking”,

(Testimony of Jules C. Stein)

and that rather short-cuts it—did you learn about the customs in the agency business, as it relates to entertainment and amusement?

A. Well, there were many customs that had been going on in this business long before we got into it.

Q. And, generally, you learned about them; is that right? A. Right.

Q. Was there any custom of split commissions, as you first learned the business?

A. Split commissions are perhaps as old as the agency business itself.

Q. Describe it, please.

A. It is a custom which developed in the negotiations for engagements where other people were perhaps representing them. It is a common practice. It existed in the days when we first were in business, and as long as I can remember, and it exists up to the present date.

Q. Now, when you first got into the business, did you split commissions with any agent? A. Right.

Q. That is, any other agents? [1236]

A. Yes.

Q. Can you mention any one of them, in particular?

A. Well, for a number of years we were splitting commissions with the William Morris Agency on the orchestras we represented that were booked by the theatres. A number of orchestras were playing the theatres throughout the country, and like the common custom, we split commissions with them fifty-fifty for many years.

Q. When you booked attractions in theatres, they demanded a split commission? A. Yes.

Q. And you paid it? A. Right

Q. You say fifty-fifty? A. Right.

(Testimony of Jules C. Stein)

Q. What was the going rate of commission at that time?

A. The going rate, as a custom, always is ten per cent.

Q. Numerous other agencies have developed since that time— strike that. There were numerous other agencies existing throughout the country at that time, were there not?

A. Yes, many agencies, representing perhaps a sectional type of business.

Q. And subsequently, other agencies developed?

A. Many of them. [1237]

Q. I believe you mentioned the fact, or some one has mentioned here, Mr. Wonders, perhaps it was, that there was a licensing arrangement which was created by the American Federation of Musicians. Is that correct?

A. Correct.

Q. That requires every agent who acts as an employment agent for a band or attraction or for musicians to be licensed by the American Federation of Musicians?

Mr. Christensen: To which we object as leading and suggestive.

The Witness: The license—

Mr. Warne: That has been testified to, your Honor. That is the reason I put it in that form.

The Court: I didn't think there was any question about that, Mr. Christensen, the mutuality of arrangement between the American Musicians Union, I call it for a short-cut, and the agencies that book bands? I thought you had agreed on that.

Mr. Christensen: I do agree that there is a requirement of a license to be had.

(Testimony of Jules C. Stein)

The Court: I don't see any objection to the question. It has been gone over and over again with two or three witnesses, who have testified to it.

Mr. Warne: It was preliminary, your Honor.

The Court: Very well. Overruled. Answer it. [1238]

The Witness: Yes.

Q. By Mr. Warne: I show you a little booklet carrying a legend list of booking agents and sub-agents, dated February 1, 1945, on the cover, and ask you if you are familiar with that booklet?      A. I am.

Q. What is it, please?

A. It is a list of agencies throughout the United States.

Mr. Christensen: Just a minute. May I offer the objection that there is no proper foundation, and that the book itself will speak for itself.

Mr. Warne: I am not trying to introduce it, except to describe it generally.

The Court: It describes itself. It does not need any one to describe it. Sustained.

Mr. Warne: All right.

The Court: That is, if it is in the English language. I haven't looked at it.

Mr. Warne: I read it in English, and I presume it is English,—shall I say, A. F. of M. English?

I would like to offer this as the Defendants' next in order, please.

Mr. Christensen: To which we object as no proper foundation. [1239]

The Court: Sustained. Will you let me see that book?

Mr. Warne: Certainly.

The Court: So that I may follow you, gentlemen.



(Testimony of Jules C. Stein)

(The document referred to was handed to the court.)

The Court: I have looked at it. Mark it for identification.

The Clerk: Defendants' Exhibit Q for identification.

(The document referred to was marked as Defendants' Exhibit Q, for identification.)

Q. By Mr. Warne: Mr. Stein, from whom did you obtain this document or this pamphlet, Defendants' Exhibit Q, for identification?

Mr. Christensen: To which we object as being immaterial.

The Court: Overruled.

The Witness: A. It was delivered to us, as agents, from the secretary of the American Federation of Musicians.

Mr. Christensen: To which we object on the ground it is his conclusion or opinion.

The Witness: It said so in the book.

Mr. Christensen: May that be stricken, please?

The Court: Yes. Don't volunteer, Mr. Stein.

The Witness: I am sorry.

The Court: I presume that is technically correct. It will be sustained.

Q. By Mr. Warne: Let me ask you this,—[1240]

The Court: There is a way of proving the authenticity of a document that is purported to emanate from a specific source.

Mr. Warne: May I inquire of counsel and see if we can't avoid it?

(Discussion between counsel off the record.)

(Testimony of Jules C. Stein)

Mr. Warne: I will withdraw the further questioning on that line at this time. Perhaps we can cure this another way.

Q. By Mr. Warne: Now, M.C.A. is engaged in what business?

A. In the booking, counseling and representing of orchestras.

Q. Generally, do you know how the business functions, how you do this, that is, your relation with the band leaders et cetera, and how you built your organization?

A. Well, a great deal of it has been described, but it is a fiduciary relationship which we have with the leaders of orchestras, in which it is our purpose and intent to book, counsel and advise these orchestra leaders to the best of our ability, so that they will secure the maximum returns and the type of engagements which is proper for them to perform, and such that will enhance their length of value in the amusement business.

Q. Is there competition in that field between agents?  
[1241]

A. There is very keen competition.

Q. Is there a general description applicable to this type of business in which Music Corporation of America engages?

A. I don't understand the question.

Mr. Christensen: Just a minute. I didn't either. I won't make an objection to it, now.

Q. By Mr. Warne: I will put it this way: Would you say that it is a personal service corporation?

A. It definitely is a—

Mr. Christensen: Just a moment. To which I object as his opinion or conclusion.

(Testimony of Jules C. Stein)

Mr. Warne: I didn't mean to use the word "corporation."

Q. By Mr. Warne: Is it a personal service type of business, rather than corporation?

Mr. Christensen: To which we again object as calling for a conclusion or opinion.

The Court: It puts the words into the mouth of the witness.

Mr. Warne: That is true.

The Court: If you want to ask him what it is, you should do so without telling him what it is and then asking him to approve it.

Mr. Warne: I would agree. I will withdraw the question in the form in which it is presented, your Honor.

The Court: Very well. [1242]

Q. By Mr. Warne: The work that you do, or the work that your company does is in the nature of what kind of work, other than you have described?

A. Well, I said it is a fiduciary relationship in which we represent the leaders of various orchestras. It is a relationship of trust, of confidence, in which we are the servant, and the leader of the orchestra is the master.

Q. Now, in that work that you do, and in that representation in which you engage, do you have occasion to discuss with the band leaders from time to time their business?

A. My personal contact is not such at the present time, but it is the primary concern of all those that are in our employ to counsel and advise in respect to everything in connection with the activities of the orchestra leader with regard to his engagements.

(Testimony of Jules C. Stein)

Q. What about the matter of prices? Is that discussed with him?

A. The prices are definitely discussed with all orchestras. They have the sole determination of where and how they play, and for what compensation.

Q. How is that arrived at? How do you get at that?

A. It is arranged by negotiation. Also, a great factor is the law of supply and demand. If you have attractions, or orchestras in this case, and if the number were greater than the number in demand, the prices would probably [1243] go down, as they have in several cycles in our industry. During the recent war period the demand has exceeded the supply and it is just impossible to fill the demand that there has been for these orchestras. There are so many ballrooms and other places of amusement that would like to have the orchestras that if you divided them into ten, it would still be difficult to supply the demand. The demand that we have had over recent years is the reason that orchestras are known by their names in contrast to where the orchestra would carry and advertise under ten or fifteen names, as did the Benson orchestras of Chicago years ago. Now, with the situation as it exists, it is impossible to meet the demand, because there is only one Harry James, and one Jimmy Dorsey, and he can play in only one place at a time, and due to the fact that these orchestras are so greatly in demand by ballroom owners, theatres, night clubs, beaches, motion pictures, radio, they will select the type of engagement they think they would

(Testimony of Jules C. Stein)

like to perform best, and they accept our advice in many cases, because the longer the orchestra can be popular the longer it is to our benefit and to their benefit. Many orchestras will wait around here in Los Angeles in making a picture and will not even go out and perform engagements we would like to have them to, because they feel the income wouldn't justify the type of work that is involved.

Mr. Christensen: May that be stricken, your Honor, as [1244] his conclusion or opinion?

The Court: The last portion of the answer was not responsive to the question and will be stricken.

Mr. Warne: Very well.

Q. By Mr. Warne: Have you discussed with any of these persons known as band leaders the matter of their going out and playing, after they are making a picture, or while they are making a picture?

A. I have had infrequent discussions in the last year or two. Before that, considerable.

Q. With what persons? Can you give us the names of those persons?

A. Guy Lombardo, Kay Kyser, Harry James, Jan Garber, Bernie Cummins, Coon-Sanders, Joe Reichman, Jan Savitt, Ted FioRito, and many others.

Q. Would they tell you their desires?

Mr. Christensen: Just a moment. To which we object as calling for hearsay.

The Court: Sustained.



(Testimony of Jules C. Stein)

Q. By Mr. Warne: Would you counsel and advise with them relative to the type of entertainment, or, rather, the type of employment that you felt they should undertake?

A. They would on various occasions want to see me with respect to the idea possibly that there were other types of engagements they would like to perform other than those they [1245] had. Practically every band wants a motion picture engagement or a radio engagement. Many of them have thought I could be of personal help and they could get such an engagement, and I was always glad to discuss it with these artists and leaders at any time that they desired.

Q. Was there any engagement—

The Court: Gentlemen, we are not going to finish with this witness tonight, so I think we will suspend now until Monday morning at 10:00 o'clock.

Mr. Warne: Yes, your Honor.

The Court: Ladies and gentlemen, remember the admonition, and keep its terms inviolate.

Mr. Christensen: Your Honor, if I am a few minutes late, may Mr. Jaffe take my place?

The Court: Yes, but we will start at 10:00 o'clock.

(Whereupon, at 4:30 o'clock p. m., Friday, February 8, 1946, an adjournment was taken until 10:00 o'clock a. m., Monday, February 11, 1946.) [1246]

Los, Angeles, California, Monday, February 11, 1946.  
10 a. m.

The Clerk: No. 4328, Larry Finley, et al., v. Music Corporation of America, et al.

(Thereupon the following proceedings were had outside the presence and hearing of the jury:)

The Court: Gentlemen, I have called you here in the absence of the jury to inform you that we have received word this morning that juror, Patsy D. Edwards, is ill with the flu at home. I have just talked with Mr. Edwards on the telephone, endeavoring to ascertain the condition a little more specifically than just the announcement that she is ill. Mrs. Edwards, of course, is conscientious about her duty here, and was preparing to leave home this morning to attend court when she was taken with what her husband thinks is an attack of the flu. She became so debilitated that she felt she should return to bed, where she is. That is about all the information he could give me. I asked him whether there was a physician in attendance. He said, "No." I asked whether she had a temperature, and he said he didn't think so, but that she had a sore throat and some other evidences of cold, and that they didn't know, of course, what the situation might be, and there was no way of her determining or his determining whether she would be available tomorrow or later.

Mr. Christensen: We are willing to stipulate that the [1248] case may proceed with eleven jurors.

Mr. Doherty: May I speak to counsel just a moment?  
(Discussion off the record.)

Mr. Doherty: We feel, your Honor, as counsel has expressed it. As your Honor has indicated, she may be

tied up for two or three days, and we are willing to proceed with eleven jurors instead of twelve, and that she may be excused permanently from the case.

Mr. Christensen: That is right.

The Court: Very well.

Mr. Doherty: While the jury is not here there is one other matter we might discuss. The lease between Mr. Finley and the City of San Diego is not in evidence. May it be agreed that the lease is not a separate one for the ballroom and a separate one for the recreation park, but that it is just one lease and there is but one obligation between Mr. Finley and the City?

Mr. Christensen: We are willing to offer our own office copy into evidence.

Mr. Doherty: Why encumber the record? I would rather the stipulation that there is but one obligation between Mr. Finley and the City for the ballroom and the recreation park, rather than a separate obligation and lease for each.

The Court: And you could mark the copy of the lease for identification, without having it incorporated in the [1249] record.

Mr. Christensen: What you say is true, Mr. Doherty.

The Court: Very well. It is so understood and so agreed to.

Mr. Christensen: Of course, your Honor, there is a separate stipulation—

The Court: Now, wait a moment.

Mr. Christensen:—as to the percentage which should be paid. You are familiar with that?

Mr. Doherty: We are not going into percentages. We make no issue of percentages; merely one obligation.

Mr. Christensen: That the lease, or, that by that lease Mr. Finley was let the entire park, including the ballroom; is that it?

Mr. Doherty: Yes.

The Court: Very well. It is so understood and so agreed.

Mr. Christensen: And as to the time, it was for a period of three years commencing on the first of January, 1945.

Mr. Doherty: Yes, for three years, beginning as of January 1, 1945, or January 3, 1945. There seems to be some difference here as to the date.

Mr. Christensen: I think the third is the correct one, but two days I don't think will make any difference.

Mr. Doherty: I assume your Honor will make a brief [1250] statement of our stipulation to the jury rather than our going into detail?

The Court: Yes.

(Thereupon the proceedings were resumed in the presence and hearing of the jury:)

The Court: The record shows that all the jurors, other than juror, Mrs. Patsy D. Edwards, are in the jury box. So stipulated, gentlemen?

Mr. Christensen: So stipulated, your Honor.

Mr. Doherty: So stipulated.

The Court: Ladies and gentlemen, I am sure that you share the disappointment of the court and counsel for both sides that Mrs. Edwards is not able to be here this morning. We were informed, and we had checked the reliability of the information which disclosed that she is ill and that the probability of her returning is somewhat uncertain. Both sides of this case have realized the situation,



and all of the parties are desirous of proceeding with the celerity that the case should have, and, accordingly, they have stipulated that the case may proceed with eleven jurors, the eleven now in the box, and that Mrs. Edwards be excused from further duty.

That is your understanding, gentlemen, and the stipulation?

Mr. Doherty: It is so stipulated, your Honor.

Mr. Christensen: It is so stipulated. [1251]

The Court: And Mrs. Dabbs, so that you won't be all alone there, I would suggest that you move over, please.

Now the jury is all present, and you may proceed.

Mr. Doherty: Would your Honor make a statement with respect to the stipulation on the lease?

The Court: I think you may make the statement, Mr. Doherty, and Mr. Christensen may check it.

Mr. Christensen: Very well.

Mr. Doherty: We have stipulated that the lease between Mr. Finley and the City of San Diego is one lease for the ballroom and the recreation park, one document; no separate document for the ballroom and another document for the recreation park, but it is one lease for both the recreation park and the ballroom.

Mr. Christensen: That is correct, your Honor. There is but the single lease by which Mr. Finley has a three-year lease, beginning on or about the 1st of January, 1945 and covering the entire Mission Beach Amusement Park, including the ballroom.

Mr. Doherty: So stipulated.

The Court: The period of the lease is for three years?

Mr. Christensen: Three years.

The Court: Beginning on or about January 1, 1945.

Mr. Christensen: That is right.

Mr. Doherty: Yes. [1252]



The Court: So understood, ladies and gentlemen, without any further evidence.

Mr. Warne: Mr. Stein, will you take the stand, please?

JULES C. STEIN,

called as a witness by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

Mr. Warne: If the court please, before proceeding with the further examination of Mr. Stein, I believe we can dispose of one or two matters by stipulation.

Counsel for the plaintiff is willing to stipulate, I am informed, that Mr. C. L. Bagley, a resident of Los Angeles, if sworn as a witness here, would testify that he is the vice-president of the American Federation of Musicians, which has been mentioned here, and that of his own knowledge Defendants' Exhibit Q for identification, is a book and publication of that organization, being a list of booking agents and sub-agents, and that the document referred to is the list as published, according to the records of the Federation, as of February 1, 1945.

Mr. Christensen: Upon counsel's statement, I will waive any further foundational requirements, and that may be introduced in evidence. I did not talk to Mr. Bagley, but I will take Mr. Warne's statement. [1253]

The Court: Very well. So ordered.

The Clerk: Exhibit Q in evidence.

(The document referred to was marked as Defendants' Exhibit Q, and was received in evidence.)

(Testimony of Jules C. Stein)

Mr. Warne: That he would further testify that the copy of the constitution and by-laws, a printed volume which has been exhibited to counsel in court, and which I have here, which is dated 1944, is the constitution, by-laws and standing resolutions of the American Federation of Musicians as of January 1, or February 1, 1945.

Mr. Christensen: I will raise no objection to its introduction in evidence.

The Court: It may be received and marked. It need not be copied in the record, however, at this time, nor need Exhibit Q be copied into the record, unless you desire it copied, gentlemen?

Mr. Warne: We do not desire it copied at this time. If any portion is read, that is another matter.

The Court: Yes.

The Clerk: Exhibit R in evidence.

(The document referred to was marked as Defendants' Exhibit R, and was received in evidence.)

Mr. Warne: With reference to Exhibit R, Defendants' Exhibit R, we have made, for the convenience and use of counsel and perhaps of the court and jury, certain excerpts [1254] which are specifically identified and which are put in type-writing for ease in reading. I would like to offer those as our No. A or our No. 1, if that is permissible, or some appropriate designation in number. I have had them conformed with the exhibit itself, the provisions of the exhibit, and they are copied from it.

Mr. Christensen: I haven't seen it, but subject to further inspection, let it go in at this time, and with the understanding that I may check it later. I don't want to take the time now to do it.

(Testimony of Jules C. Stein)

The Court: It will be so received. What will it be, Mr. Frankenger?

Mr. Frankenger: R-1.

(The document referred to was marked as Defendants' Exhibit R-1, and was received in evidence.)

The Court: Proceed, gentlemen.

By Mr. Warne:

Q. Mr. Stein, you are familiar with Defendants' Exhibit Q, which was shown you here the other day?

A. I am.

Q. Your company is listed as a licensed agent therein?

A. We are.

Q. Together with other companies, and particularly the companies that you have mentioned upon the witness stand?

A. We are one of a list of over 1,000 licensees of the [1255] American Federation of Musicians.

Q. These being licensed agents; is that correct?

A. Licensed booking agents throughout the United States, and I think some in Canada.

Q. Now, when we recessed the other day, we had been questioning on and discussing the matter of the nature and character of the counsel and advice rendered by your company to the band leaders whom it represents. There was no discussion in that with reference to the matter of prices. Are you familiar with the matter of the pricing, that is, the fixing of the compensation which the band leader demands for the performance of himself and his orchestra?

A. I am reasonably familiar with it, yes.

(Testimony of Jules C. Stein)

Q All right. Will you explain how that is done?

A. Well, primarily it is the business conditions which relate as one of the main factors in pricing. Prices go up and down in the amusement business perhaps faster than in other lines of industry, and the law of supply and demand again is a main factor. The greater the demand for orchestras, the higher the price, and the greater the public patronage, the higher the price, because as a rule these attractions or orchestras will play on a guarantee and percentage basis, particularly in the one-night stands. However, prices are higher in hotels, cafes, theatres, and other places of amusement when business conditions are better. [1256]

The leader has his costs by virtue of the number of musicians, their transportation from place to place, his union taxes and surcharges, and the prices will be greatly determined by his success in the various engagements he performs.

There is no regularity of prices. It is not unusual that an orchestra leader will want to play certain types of engagements where prices are considerably lower, or where the employer cannot pay what other places might.

Q. Can you give us an example of that?

A. For example, one of the classical examples which happened this last summer was in the case of Harry James, who went to New York from here and played the Astor Hotel, and he received I think either \$3,000.00 or \$3,500 a week for his orchestra. He played every night of the week, I think from about 7:00 o'clock until after midnight, and Saturdays a little later; and still he would go to the Paramount Theatre, which was next door to the

(Testimony of Jules C. Stein)

Astor Hotel, which he played either before or shortly after, and he received \$10,000.00 a week.

Hotels and cafes cannot pay quite the prices that other places of employment will pay. The higher prices are paid by motion pictures to orchestras. The next highest prices are paid probably by radio performances. One-night stands might come in about the same category, or perhaps higher than [1257] theatres. The lowest prices are paid hotels. First, they don't quite do the business that the others can do and they have greater costs of operation, such as service, waiters, food, and, as a matter of fact, until the recent boom in business over the last three or four years, it was pretty rare for hotels to make money even at the prices they paid orchestras.

Q. That is on the dining-room operation?

A. That is right, on the dining-room operation by itself.

Q. Now, you spoke of the fact of the number of musicians as determining a part of the cost or a part of the price. Is it just the number, or are there any other factors in relation to the employment of musicians other than the number that might increase the cost?

A. There is a basic minimum which the union requires, and they cannot pay below that, but the rest of the price depends greatly upon the popularity of the orchestra itself.

Q. What about the popularity of the artist, that is, the individual musician?

A. I mean of the leader, because the leader is primarily the person that lends this popularity. While there have been great changes in the number of musicians in the orchestras in recent years on account of the draft,



(Testimony of Jules C. Stein)

on account of the man-power for the armed forces, the changes have not [1258] been so great since the war period. The chances are there will be greater stability after this war period.

Q. In your counsel and advice to the band leaders and orchestras whom you represent, are there occasions when you recommend them playing at a place that has a lower rate? You spoke of the Astor Hotel versus the theatre engagement of Harry James, for instance. Tell us what is done in that respect.

A. Our primary concern is to see that the orchestra leader retains his popularity as long as possible and that his earnings shall be as high as possible commensurate with the maintenance of his career for as long a period as possible. For this reason we will often recommend and suggest that they play types of performances that will be to their enhancement. Certain types of engagements might include broadcasting and recording possibilities. Many of the orchestras like to play in New York City where they are close to the publication of new tunes, or they are close to the recording centers, and since New York City is still considered the theatrical center of the world, they will all try to spend a great deal of time there. Second to New York today is, I think, Los Angeles, because of the radio broadcasting and motion pictures. However, motion pictures in the last year or year and a half have become less interested in orchestras, since apparently they have outlived the great [1259] value which they had for the two or three years previous to the last year or two.

(Testimony of Jules C. Stein)

Q. In your work of counseling and advising, are you required to know available places such as theatres, ballrooms, hotels, et cetera, where the bands and orchestras perform?

A. We are required to know, or, at least expected to know, every place of amusement in the United States and Canada which can employ our orchestras.

Q. Now, in your counseling and advising do you consider the relative value of places of employment?

A. We are supposed to present to the leader our reasons perhaps for employment in certain places of engagement in preference to others. That is perhaps where we are expected to counsel and advise with our leaders.

Q. Now, in that regard, that is the providing, or, rather, the knowledge of places, proper places of employment, do you canvass from time to time the operation of a particular operator of a place, such as a ballroom or a theatre, with reference to the possible engagement of orchestras?

A. Well, we do as best we can, but it is general knowledge by the playing of engagements and the rates that orchestras receive, and with the general knowledge in the trade it becomes a matter of an inherent or perhaps intuitive judgment as to what is the best advice to give, from our point of view. [1260]

Q. You say the best advice. You are concerned with what?

A. With advising our orchestra leaders to the best of our ability so that they will perform the type of engagements that will be to their best advantage.

(Testimony of Jules C. Stein)

Q. I see. Of course, you get a commission on their successful, or, rather, upon all of their engagements; is that correct?

A. We receive a commission on all of their engagements.

Q. With reference to the matter of commission, are you familiar with the net commission earned by your company during the last year?

A. Commissions are based upon 10 per cent of the gross of the engagement performed by the orchestra, and up to 20 per cent on what we call one-night stands. The reason for the higher charges there is because of the tremendous amount of work involved in each individual engagement, as related or as compared to engagements of a week or longer.

While the commissions are stated at 10 per cent and up to 20 per cent, that does not apply upon a gross figure, because you have to allow the orchestra leader a deduction for all transportation incurred by himself and his orchestra, and you have to allow him a deduction for the union taxes, the surcharges, and many other charges he has in relation to an engagement of that type. The transportation on one-night [1261] stands is very high, and, therefore, while we speak of commissions up to 20 per cent, the average is considerably lower. As a matter of fact, the total percentage on all orchestras booked for the past year represented slightly under 9 per cent for our company.

Q. Now, some mention has been made, and I believe you were asked the gross volume of business done by

(Testimony of Jules C. Stein)

Music Corporation of America, and you stated that figure. Am I correct?

A. Well, I was asked whether we did around \$15,000,000.00 gross business. I answered, "Yes." Our gross commission before any deductions whatsoever for our cost of operating the institution ran about one million four.

Q. How many employees has Music Corporation of America?

A. We have approximately 175 employees in Music Corporation of America.

Q. Do you know approximately how many musicians there are in the United States who are members of the American Federation of Musicians?

A. There are approximately 140,000 members of the American Federation of Musicians.

Q. Do you know approximately the number of musicians in the orchestras under contract to Music Corporation of America?

A. I would say between four and five thousand.  
[1262]

Q. You spoke about New York as still being the center in so far as musical entertainment or entertainment is concerned. Are you familiar with what area of the country is the best market for bands of the character that have been discussed here in this trial?

A. Well, the greatest market is naturally where the greatest population exists, and since the greatest population exists along the eastern seaboard, or at least in that direction, the greater demand for attractions is naturally from that territory. There are perhaps some additional demands that were created out here during

(Testimony of Jules C. Stein)

this war boom period, but it is not a great increase compared with the demands that have been created in the East.

Q. You have spoken about the competition, in answer to some prior questions, the competition between the agencies for business. Is there any other kind of competition that reflects itself in trying to get these bands or orchestras for purposes of engagement?

A. Well, we have keen competition amongst our own offices because the demand by each office is so great in relation to the attractions available that they are always trying to secure as many of the name bands, as has been introduced here by name bands, to this territory or to the other territory as is possible. There are perhaps other reasons why. Some of the prices have been increased greatly because [1263] of the tremendous demand for attractions, and when these various offers are submitted to the leader for his judgment and approval, he has the final choice of deciding where he would like to go, where he would like to play, and the type of engagement he would like to play.

Q. Now, in the course of your business have you had occasion from time to time to discuss with the band leaders themselves the matter of where they would like to go and where they would like to play, and the nature and character of the engagements they would like to engage in?

A. I used to be very active in that phase of the business, but in the last few years I have not been as active as before, and I only come in contact with some of the leaders occasionally in reference to particular types



(Testimony of Jules C. Stein)

of work they would like to do, where my support is requested. [1264]

Q. You mentioned 175 employees; how many of them are vice presidents?

A. There are 15 vice presidents in our company.

Q. And Mr. Barnett became a vice president when?

A. In January of last year.

Q. He is not a member of the Board of Directors of the corporation?

A. No; he is not.

Q. I don't want to go into this matter of name bands or name orchestras. I believe you have given us a definition of that. But I would like to cover this fact: It has been suggested in the testimony of one witness, Mr. Finley, I believe, that in the matter of orchestras there are orchestras or bands that are equally valuable and that could be said to be equally known nationally. Is that a fact, or what is the fact in that regard?

A. That, again, is a question of public opinion. According to my viewpoint, there is no such thing as an equally important band. Even the polls that are taken by the national trade publications for popularity will always show one orchestra more popular than another. It is a poll similar to what they run for the motion picture industry or the radio industry.

Q. In your dealings with orchestra leaders, it has already been mentioned that you are licensed by the American [1265] Federation of Musicians. What is done with reference to observing those licensing agreements or the licensing agreements which exist?

A. Well, the provisions of the licensing agreement itself is rather specific in what our obligations are and

(Testimony of Jules C. Stein)

what we are expected to do in order to keep our agreements with our attractions or our orchestras in force. In the event there are any disputes at any time regarding our management agreements, the dispute is placed before the International Executive Board of the American Federation of Musicians, whose decision is final as to whether our agreements remain in force or are cancelled.

Q. Is there provision, also, or provisions that have to be observed in order for you to retain the license which you have?

A. We have to provide a minimum amount of work per year at prices that are commensurate with the type of engagements the orchestra has theretofore performed. There is a minimum at which we can book the attractions, and there is a minimum amount of work, which I believe is a minimum of 40 weeks a year; and unless we can secure engagements for a minimum of that amount, upon the terms specified and upon the type of engagements commensurate with the types of engagements the orchestra performed theretofore, they have a right to cancel; and automatically, after the third year, unless engagements are increased by a minimum of 25 per cent over the previous [1266] years, they again have a right to cancel.

Q. Are you familiar with whether or not the employment of so-called top name bands is necessary for the successful operation of the ballroom business?

A. In my opinion, definitely not. Many of the ballrooms and seaside amusement places—as a matter of fact, many of the employment places throughout the United States are not dependent upon so-called name bands, as we have heard it defined by others here, for

(Testimony of Jules C. Stein)

their success. The amount of business that you do has nothing to do with the amount of money that you make, and it is not unusual to expend a lot in an amusement place and find out that you end up at a loss.

Q. Mr. Stein, do you know any ballrooms in the United States that operate on the basis of not using so-called name bands?

A. I can mention some of them.

Q. Would you illustrate, please?

A. Chicago, you have the Merry Gardens, the Paradise Ballroom, O'Henry Park; Detroit, the Greystone Ballroom; New York City, Arcadia Ballroom; Brooklyn, Roseland Ballroom; Boston, State Ballroom; Miami, Flageler's Gardens; Cleveland, Euclid Beach; Norfolk, I think the name of the place is Seaside Ballroom; Point Pleasant, New Jersey, Jenkinson's Pavilion.

There are a number of summer seaside ballrooms that string all the way from Norfolk up through Maine. There is [1267] a place in Galveston, I believe, called the Ballienese—

Q. You have listed a number.

A. —the Fort Worth and Houston—pardon me.

Q. May I ask you this: Are those of recent origin, or have they continued over a period of years?

A. They have operated for many, many years.

Q. I show you defendants' Exhibit F; I believe you signed that contract, Mr. Stein?

A. Yes; I did.

Q. That is the contract with Mr. Dailard and your corporation of May, 1944?

A. Correct.

(Testimony of Jules C. Stein)

Q. Do you know Mr. Dailard?

A. Well, I know him now.

Q. Did you know him before this trial started?

A. No. I was under the impression I had met him once in my office, but I was not sure.

Q. Did you ever have any conversation with him about the operation of this ballroom in Pacific Square in San Diego?

A. Not at all.

Q. Or the operation of Mission Beach?

A. Not at all.

Q. And, I take it, of course, you have had no discussion with him with reference to keeping Mr. Finley from getting bands at Mission Beach? [1268]

A. I have had no conversations with him.

Q. Did you ever have any conversation with anybody with reference to pursuing any course of conduct or doing any acts which would prevent Mr. Finley from securing band attractions at Mission Beach?

A. Definitely not.

Q. Before this lawsuit was started did you know of Mr. Finley in any wise? Had you met him?

A. No; I had not.

Q. Did you know that he operated Mission Beach?

A. I did not.

Q. Did you know of the relative positions of Pacific Square and Mission Beach in any wise?

A. I did not.

Q. When this agreement was signed by you on the part of your company, did you have any conversation

(Testimony of Jules C. Stein)

with anyone of your staff or in the Music Corporation of America relative to this agreement?

A. I believe the agreement was brought in to me by Mr. Bishop. I read the agreement and signed it.

Q. Was it your intention in signing this on behalf of your company to restrict or restrain the business of booking of bands or orchestras to play engagements in the City of San Diego?

A. Definitely not; on the contrary, to create employment [1269] for others.

Q. What do you mean by that?

A. Well, this created a new place of employment, or additional employment, for orchestras that we represented.

Q. Was there ever any act or conduct on the part of your corporation or yourself, or to your knowledge, of Mr. Barnett or Mr. Bishop which had for its purpose the restraining or restricting of the booking or the business of booking name bands or orchestras, or bands or orchestras, in San Diego territory?

A. Definitely not.

Q. Or at any other place? A. Definitely not.

Q. Did you have any knowledge at all of any conversations that Mr. Bishop had with Mr. Flynn and, I believe, Mr. Webster or Mr. Wonders that have been related here as to Mr. Finley's bid and their part in it?

A. Definitely not.

Mr. Warne: You may cross examine.



(Testimony of Jules C. Stein)

Cross Examination.

By Mr. Christensen:

Q. Didn't they ever tell you about it? A. No.

Q. You told me a moment ago or you said a moment ago that one of the purposes of the contract that you signed was [1270] to create a new place of employment for your orchestras in San Diego; that is a correct statement, isn't it? A. Right.

Q. Had you had any difficulty theretofore in finding a place in San Diego for your bands?

A. I don't know how many of our orchestras had performed there previously, but this assured a definite flow of attractions and orchestras, or orchestras into a place, with a man willing to spend the money to put up a building that could give employment to orchestras that we represented, as well as others.

Q. Well, you had been playing your orchestras there in San Diego for a considerable period of time, hadn't you, sir? A. I am not sure.

Q. Well, you know that some of your top bands had played Mission Beach immediately prior to the time of the execution of that agreement, don't you?

A. I presume so.

Q. As a matter of fact, you had a prior contract with Dailard, didn't you?

A. We had the letter agreement for one year prior to this agreement that I signed.

Q. And it contained provisions there for options, didn't it?

A. I understand it is similar to the agreement which I [1271] signed.

(Testimony of Jules C. Stein)

Q. So, as a matter of fact it did not create any new opportunity then, did it?

A. It assured an opportunity for the attractions for the succeeding three years at least.

Q. Could you tell me the average number of musicians in a band? Is there such a thing, sir?

A. I don't think that I could tell the average. You would have to take a list of all the bands in the United States and divide it by the number of musicians that are employed—or, I mean just the opposite, the number of musicians divided by the number of bands there are in the United States. I don't think it has ever been determined.

Q. No; I am talking about bands that you represent, sir.

A. We have never done that, either.

Q. Well, can you tell me how many there are in any particular band of yours?

A. The numbers have fluctuated greatly in recent years, and it would be impossible for me to give the number.

Q. Well, can you give me a list, then, for example, of how many members are there in the Harry James band?

A. Oh, I would think around 20.

Q. And how many in the Jan Savitt band?

A. I really don't know. I would have to guess, and I would say some place between 15 and 18. [1272]

Q. How about the Jan Garber band?

A. I imagine around 15.

Q. How many in the Lawrence Wilkey band?

A. I don't know.

(Testimony of Jules C. Stein)

Q. How many in the Bob Crosby band?

A. He has been in the service.

Q. He has got a band now, you know?

A. Now, but I don't know how many musicians he has got.

Q. You represent Bob Crosby, don't you?

A. I believe we do.

Q. He is playing now at the Palladium here, isn't he?

A. Right.

Q. And Lawrence Wilkey, another one of your bands, is playing at the Aragon now, isn't it?

A. I don't know.

Q. And another one of your bands, the Jan Garber band, is playing at the Trianon now, isn't it?

A. I am not sure.

Q. Another one of your bands, the Jan Savitt band, is playing at the Casino Gardens now, isn't it?

A. I am not sure.

Q. Another one of your bands, the Harry James band, is playing at Meadow Brook now, isn't that right?

A. I think I saw the advertisements in the newspaper.

Q. In addition to these ballrooms which I have just [1273] mentioned, your orchestras play in Long Beach, too, don't they?

A. I presume they would.

Q. And they play in other portions of Los Angeles County, do they not, sir?

A. Yes.

Q. And they play in Orange County, too, don't they?

A. Is that San Bernardino?

Q. Orange County, sir.

The Court: No.

(Testimony of Jules C. Stein)

The Witness: I mean, is that the City of San Bernardino?

The Court: No.

Q. By Mr. Christensen: The City of San Bernardino, Mr. Stein, is located in the County of San Bernardino.

A. I didn't know that. I don't know where Orange County is.

Q. Santa Ana is the County seat. Does that help you any, sir?

A. Well, I presume they would play there.

Q. And they play in different portions of San Diego County, too, don't they?

A. Well, they play all over the United States.

Q. Now, you gave us some illustrations of ballrooms that you say do not use name bands as a policy or practice. All of those you told us about were located many miles from here. [1274] Can you think of any right here in Southern California that would help us?

A. I heard a number of them mentioned here the other day, but they are not as prominent as those I have mentioned in the East. I know of the El Patio ballroom, in San Francisco.

Q. That is not a Class A ballroom, though?

A. Well, that is perhaps as difficult to differentiate as a name band.

Q. Do you know what I mean by a Class A ballroom? What are the first-class ballrooms?

Mr. Warne: May I have that question, please?

The Court: I don't know whether he knows what you mean about it or not. Perhaps you had better tell him what you mean.

(Testimony of Jules C. Stein)

Mr. Christensen: Perhaps that is true. Let me withdraw it and say:

Q. You do know what is meant by a first-class ballroom, don't you, sir?

A. Well, I possibly know one of the most expensively built ballrooms in the United States and use that as a criterion.

Q. Let us take right here in California, where we would all be familiar with it. You would say that the Palladium is a first-class ballroom, wouldn't you?

A. Definitely. [1275]

Q. You would say the Trianon is a first-class ballroom, wouldn't you.

A. Well, it is a question of operation again. They have changed the form of operation, that it might be classified today as using more expensive bands, but they have for many years operated successfully without the expensive bands.

Q. That was under Horace Heit's management?

A. That is now.

Q. And for how long has he had it?

A. I imagine he has had it for two or three years; but it was established many years before that. I think originally it was called Topsy's.

Q. You would say that was a first-class ballroom, now, wouldn't you?

A. Well, I don't know exactly what the classification would be. Is it the amount of money that it costs to put up the building, or is it the fact that they are spending more money for bands? I don't think the cost or the looks of a ballroom is particularly the determining factor.



(Testimony of Jules C. Stein)

Q. What would you say was the determining factor, sir?

A. Well, we know in show business that the combination of a number of factors that make for importance or for value or for draw. I don't think you can put your fingers on any specific ones.

You asked me if the Palladium was a top ballroom. I said, yes. I don't think there is any question there. And I [1276] think the Aragon and Trianon in Chicago are expensive top ballrooms, although they do not use so-called big name bands except occasionally.

Roseland in New York is certainly not in the same category as a ballroom as the Arcadia. It is on the second floor and the Arcadia is on the main floor. With the Arcadia, which is on the main floor and on a level, and Roseland on the second floor, and the Arcadia does not use name bands but occasionally, but Roseland does a bigger business on the second floor.

Q. Can we get to California or Southern California?

A. I can't as readily. I mean, I am not as acquainted with the ballrooms out here as I am with those in the East, because I was more active when I was in the East, and when I came out here I did not spend as much time in the orchestra end of the business.

Q. Then, you can't give us any illustrations here in California, any others except perhaps this El Patio, you say, in San Francisco?

A. El Patio I knew in San Francisco.

Q. But except for that case, you can't give us any others?

A. If you happen to mention things, if I remember, I will be glad to answer them.

(Testimony of Jules C. Stein)

Q. Let me try here. Casino Gardens at Ocean Park, is[1277] that a first-class ballroom, in your opinion?

A. Well, that comes into the same definition, again, as you asked me on Topsy's.

The Court: Just a moment, Mr. Stein.

The Witness: Pardon me.

The Court: I do not believe you should question him about "first-class ballrooms." I can see some objectionable feature to evidence of that kind. The witness has used the word "tops". Maybe that is good nomenclature in this line of interrogation, perhaps more suitable and more characteristic and more accurate than "first-class ballrooms."

Mr. Christensen: I appreciate that. Is that one of the top ballrooms, Casino Gardens, Mr. Stein?

A. Well, I would say no.

Q. Is the Aragon ballroom there a top ballroom?

A. I have never seen Aragon ballroom.

Q. Is the Meadow Brook ballroom a top ballroom, sir?

A. I would say no.

Q. Now, what are the factors, in your opinion, that make for a top ballroom?

A. Well, if you combined the element of cost, such as represented in the Palladium or the Aragon or the Trianon, and you combined that with the performance of, perhaps, expensive bands and you combined it with a good location and with smart, efficient operation, you might have some of the [1278] important assets of a top ballroom. You could have the same assets with the expensive type of building and a carefully planned operation without the use of so-called big name bands, believing

(Testimony of Jules C. Stein)

that a fine policy of operation with the other entertainment features, such as special dance nights and special waltz nights, could achieve, perhaps, as great and profitable an operation, if not more, and have a longer period of popularity and financial success.

The dearth of name attractions is a danger, sometimes, the employment of them in the ballrooms, because the failure to secure enough of them at times and the fact that there are so few of the category that has been mentioned here, so-called top name bands, that sometimes endangers the policy using them, so that some type of another operation would be much more successful and financially profitable.

Q. Can you give me an illustration of one such ballroom in Southern California?

A. Well, I presume the two that were mentioned here the other day, here in town, are making money but—

Q. Well, you don't know anything about them; is that right?

A. No; I don't. I would say the Palladium ballroom is financially successful.

Q. That is the only illustration of a ballroom such as you have described here? [1279]

A. Well, I said I am not too familiar with the operation of the ballrooms on the West Coast.

Q. You have told us of the number of affiliates of M.C.A. Do they have any separate offices?

A. They are housed in the same building. I mean that we have two buildings now here.

(Testimony of Jules C. Stein)

Q. The same employees work in different affiliates?

A. No. There are some of the employees work for more than one company, but they are in the minority.

Q. Mr. Barnett, he is connected with which affiliates?

A. He is employed by Music Corporation of America.

Q. And which affiliates, sir?

A. He is a secretary of Movie Corporation of America, which is not a paid position.

Q. Are any of the positions in the subsidiary organizations paid by the organizations, or are they paid by M.C.A.?

A. They are paid by the respective organizations for which they are employed.

Q. All right. Can you tell us any—well, who is employed by the Artists Corporation—what was it?

A. M.C.A. Artists.

Q. That is right. Now, tell me who is employed by them?

A. Well, I would have to have a list before me; but we have, I would say, approximately 75 or a hundred employees in [1280] that company.

Q. Is either Mr. Bishop or Mr. Barnett employed by that company?

A. Neither one.

Q. Generally speaking, though, the organizations, your affiliates and Music Corporation of America work together, do they not, sir?

A. They are called affiliates and they act as affiliates.

Q. What are the functions, then, of Music—was it M.C.A. Artists, Ltd.? Was that the correct name of it?

A. M.C.A. Artists, Ltd.; yes.

(Testimony of Jules C. Stein)

Q. All right. Now, what are the functions of that company?

A. It represents artists in the field of personal services for artists that appear in places of amusement, primarily motion pictures.

Q. And the California Movie Corporation, what is the function of it?

A. That is just a small company which formerly handled a few radio artists and has been kept active. It is not a very active institution, but its field is similar to M. C. A. Artists, Ltd.

Q. And what is the function of Management Corporation of America?

A. Management Corporation of America is primarily active [1281] in radio bookings.

Q. And what is the function of Management Corporation of America?

A. I thought that is the one you just asked me.

Mr. Warne: That question was just asked.

Mr. Christensen: All right; I will withdraw it.

Q. What is the function of Concerts Corporation of America?

A. That is a new company. It is formed to represent members in the concert field. That is covered by the American Guild of Musical Artists, one of the four A's, licensed by the American Federation of Labor.

Q. Do you not have two corporations known as Management Corporation of America, one bearing the name



(Testimony of Jules C. Stein)

“New York” after it, and the other one bearing the name “California” after it?

A. Yes. The California one is one that is primarily interested in a few real estate developments here, and it is not active.

Q. Do you maintain a—

A. It is not in the agency field.

Q. Do you maintain an office there in your building?

A. It is similar to Movie Corporation of America, which is essentially inactive.

Q. Who are the officers of it? [1282]

A. The officers of Management Corporation of America of California are myself, as president, Leland Hayward, as vice president, Lou Wasserman, as vice president, Mr. Schreiber, as vice president. I am not sure. I think there are a few other officers.

Q. They are also officers of Music Corporation of America? A. Right.

Q. You say that there were additional costs to you in handling one-night bookings as distinguished from what you call permanent, being a week or more; that is correct, isn't it?

A. That is a classification given by the American Federation of Musicians.

Q. All right. Tell me what are the items of additional cost for one-night engagements as against longer engagements—

A. Well, when you—

Q. —from your point of view?

A. What is that?

(Testimony of Jules C. Stein)

Q. From your standpoint?

A. When you solicit and book a permanent engagement of one week or longer, it is usually done by telephone, telegraph, personal contact or letter. When the booking is made, the engagement operates for a length of time, usually considerably in excess of one week, and therefore the costs involved in [1283] continuous contact with that engagement are rather nominal.

When it comes to one-night stands, there is a problem of trying to fill all seven nights a week for the orchestra. There is continuous telephone, telegraph, individual contracts, individual contracts and the supplying of advertising and other materials for that engagement. In a sense, it is practically the same amount of work for each engagement or each few engagements as you would do for an engagement of a week or longer. The costs are many times in proportion to the costs of handling a permanent engagement.

Q. Now, while an orchestra is playing at a ballroom you people check there to see how he is doing, don't you?

A. Well, we get the record of the returns or the results of that orchestra by virtue of the amount of business they do, whether they go into their percentage or not, and the records are rather complete.

Q. I mean you check them during the engagement, not only at the end; isn't that true?

A. Are you referring to one-night stands?

Q. No. I am asking you now concerning those of longer duration.

A. A week or longer?

(Testimony of Jules C. Stein)

Q. Yes, sir.

A. Well, if the orchestra is not doing well, you hear about it very fast. [1284]

Q. Don't you call then to find out how they are doing?

A. Well, there is a contact established between us and the employer, as well as the leader of the orchestra.

Q. And do you do the same thing with reference to your one-night engagements?

A. Well, the exact method in which it is operated to-day I wouldn't know all the details, but you do stay in contact with your employer and with the leader of the orchestra. You establish as close a contact as possible for the benefit of all concerned.

Q. In this list of persons licensed by the American Federation of Musicians—quite a lengthy list—you are not familiar with very many of these people, are you?

A. I would have to see the list to be able to tell you.

Q. Well, for example, I notice in San Diego the first one listed is Warner Austin.

A. You are referring to agencies?

Q. Yes, sir.

A. I thought you meant the people in our company there. You are referring to the agency list. Will you repeat the question, please?

Q. I will withdraw it so we will start again. For example, in the San Diego list you were not familiar, were you, with the first name on that list, Warner Austin, were you?

A. I am only acquainted with a few of the licensees of [1285] the American Federation of Musicians.

Q. Isn't that true even here in Los Angeles?

A. Will you read the list to me?

(Testimony of Jules C. Stein)

Q. Well, now, let me ask you a few of them. Do you know Billy White? A. No.

Q. Do you know Walker Granville Agency?

A. No.

Q. Do you know the Walter Trask Theatrical Agency?

A. No.

Q. Do you know Bill Smallwood? A. No.

Q. You know the Small Company, don't you?

A. Yes.

Q. Do you know Edna Scofield? A. No.

Q. Do you know Mrs. Edna Whiting? A. No.

Q. Do you know Frank J. Rock? A. No.

Q. Do you know the Premier Theatrical Agency?

A. No.

Q. Do you know Otis E. Pollard? A. No.

Q. Do you know Patrick & Marsh? [1286]

A. No.

Q. Do you know National Amusements?

A. Yes.

Q. Do you know Joe Morales? A. No.

Q. Do you know Barry Mirkin? A. No.

Q. Do you know Grace McKee?

A. No, either way.

Q. Do you know the Harold Leyton, Inc?

A. No.

Q. I see that it has Mr. Harold Leyton's name underneath it. Does that help you any? A. Either way.

Q. Do you know Sam Kramer? A. No.

Q. C. C. Westover? A. No.

Q. Lewis Story? A. No.

Q. Lottie Horner? A. No.

(Testimony of Jules C. Stein)

Q. Claire Schwartz? A. No.

Q. Walter Herzbrun? [1287]

A. I think I have heard that name.

Q. I think he used to work for Paramount, if that might help you. He was an attorney for them, isn't that right? A. I don't know.

Q. Do you know Kenneth Harlan? A. No.

Q. Ivan Eppinoff?

A. He is the leader of an orchestra.

Q. All right. Do you know Ivan Scott?

A. Same fellow.

Q. What is it, the same name? A. Yes.

The Court: You identify him both ways, Mr. Stein.

Q. By Mr. Christensen: That is quite common, isn't it, in the theatrical business to have a theatrical name which may be different from one's true name?

A. It occurs in other places besides the amusement business.

Q. Yes. And it is very common there, isn't it?

A. Yes; more common.

Q. Do you know California Artists Agency?

A. I don't believe I do.

Q. Martha Gaston? A. No.

Q. Kathryn Burns? [1288] A. No.

Q. Joe Bren? A. Yes.

Mr. Christensen: I have read all of the list there now. Thank you very much.

Mr. Warne: I just have one question, and I believe I am through with this witness.

The Court: Go ahead.



(Testimony of Jules C. Stein)

Redirect Examination

By Mr. Warne:

Q. Mr. Stein, these several companies that you have termed affiliates, in addition to separate officers, do they have separate sets of books kept for them?

A. They are separate, independent corporations for which separate books are kept and separate accounts are rendered and separate returns made.

Q. Tax returns?

A. Yes. I stated before that they were separately licensed by the different guilds and unions.

Mr. Warne: No further questions.

The Court: I believe we will take our recess now, ladies and gentlemen, for a few minutes. Remember the admonition and keep its terms.

(Short recess.)

The Court: All present. Proceed. [1289]

Mr. Doherty: If the court please, the defendants rest.

Mr. Christensen: Before you do, may I have some questions on your books there of Dailard?

Mr. Doherty: Do you want to recall Mr. Dailard?

Mr. Christensen: No. Yes; it was Mr. Dailard who testified concerning this statement of the Beach Amusement.

Mr. Doherty: Yes.

Mr. Christensen: Yes; I would like to have him before you rest on that, because I have reserved that right.

## WAYNE DAILARD,

called as a witness by and on behalf of the defendants, having been previously duly sworn, was recalled and testified further as follows:

## Further Cross Examination

By Mr. Christensen:

The Witness: May I have a copy of it?

Mr. Christensen: That is the only copy I have, Mr. Dailard.

The Court: Here is the other, Mr. Dailard.

Mr. Doherty: There is one here in the exhibits, too, your Honor.

The Court: Yes. You had better use the exhibit, I guess, Mr. Dailard, and give me back mine.

Q. By Mr. Christensen: Mr. Dailard, this statement which you have furnished us and which has been introduced into [1290] evidence as Exhibit P, was prepared when, sir?

A. Well, it was prepared—this re-audit was taken only a couple of days ago. I think the original statement was prepared sometime in January, right at the close of the year.

Q. Well, where is the original audit, then?

A. This is it. I mean this is the same thing that you have a copy of his original audit.

The Court: You are referring to the exhibit now?

The Witness: That is right, sir.

The Court: Exhibit P.

Q. By Mr. Christensen: Who made the audit, sir?

A. Mr. Rathman.

(Testimony of Wayne W. Dailard)

Q. Did you give him that book which you have heretofore brought into court and which is now before you, and which you have identified as your book of accounts?

A. That is correct.

Q. Is that correct? Have I correctly identified it for you? A. Yes. Yes; this is our original.

Q. And did Mr. Rathman have that? A. Yes.

Q. Was that made, that audit, made from your books there?

A. You refer to that audit as being the audit that is reflected by these statements; is that your question, sir? [1291]

Q. Yes; that is identified as Exhibit P.

The Court: Just a moment, gentlemen, please. Let us refer to the exhibit by its designation. That is the audit that is impressed upon Exhibit P in this case?

The Witness: Yes.

Q. By Mr. Christensen: Was that all that you furnished to Mr. Rathman as a basis for this audit, the book which you have now before you, sir?

A. No. We furnished a trial statement, a trial balance, that he coupled the two of them together.

Q. Have you now told me everything which he used in preparing Exhibit P? A. Yes.

Q. Then, this audit, Exhibit P, simply reflects, does it not, a recapitulation of the matters and things which you say are contained in the book before you?

A. That was the intention; yes.

Q. Can you turn to that book and tell me what check No. 3358, being a check bearing date of July 27, 1944, was for? A. Check No. what?

(Testimony of Wayne W. Dailard)

Q. 3358.

A. I don't know whether I can even find where they are listed.

Mr. Doherty: Mr. Christensen, if your auditor has looked [1292] through those, he more quickly could point out the place where that was found in the books.

The Witness: I mean, I am very happy to give you anything I can find in here, but I don't know where to find it.

Mr. Christensen: He does not appear to be in the courtroom, sir, or I would have him help you.

Mr. Doherty: Do you know what part of the book it came from?

Mr. Christensen: I do not, personally, Mr. Doherty. I personally did not examine the book, sir.

The Witness: It would be under a check record, I assume, wouldn't it? What is the number and what is the date?

Mr. Christensen: The number is 3358; the date is July 27th.

The Witness: And what year?

Mr. Christensen: 1944.

The Witness: Will you give me the number? Check No. what?

Mr. Christensen: I will repeat. 3358 is the number; July 27, 1944, is the date.

The Witness: It is probably right here. Can you give me something of the detail of the check, who it was made to or the amount of it? Do you have any of that from your record?

Mr. Christensen: Yes. The check was drawn to the order [1293] of Fred Heightfield or Heightfeld.

(Testimony of Wayne W. Dailard)

The Witness: Fred Heightfeld on the 27th?

Mr. Christensen: Yes, sir.

The Witness: That would be 3358?

Mr. Christensen: Yes, sir.

The Witness: For \$416.80.

Mr. Christensen: Yes, sir. What was that for?

A. I have no idea without the voucher supporting it.

Q. Do you have those vouchers?

A. I don't have them here, no. He was in our employ. It could have been—I have no idea what it was.

Q. You say he was in your employ?

A. I think he was at that time; yes.

Q. What were his duties?

A. I think he was a press agent.

Q. Well, you say "you think"?

A. That is what I said; yes.

Q. Do you remember at all, sir?

A. Yes; I know the boy and I know that over the past 15 years he has been in our employ at different times; and I assume, a check having been drawn to him, that he was in our employ at that time.

Q. Well, all right. Will you tell me now what check No. 3582 represents? A. In the same month?

[1294]

Q. No. That was in September.

A. September what date?

Q. September 12th, sir.

A. September 12th, and the check was 3570; is that the check number?

Q. No, sir; the check is 3582.

A. And September, 1944?



(Testimony of Wayne W. Dailard)

Q. Yes, sir.

A. I think that must be incorrect. The only check number I have, drawn on September 12, 1944, to Fred Heightfeld is check No. 3510.

Q. All right. Will you from your records tell us, then, what check 3582 does represent, sir?

A. Drawn on September 12th?

Q. Irrespective of the date, will you tell me what Check 3582 represents?

A. In the month of September?

Q. Well, irrespective of the month, will you tell me?

A. Well, I will tell you if I can find it, Mr. Christensen. I am not an auditor, you know. I have one here for \$157.66, but it looks like Bushes—no. Well, I can't even read who this is to. If you can—

Q. Is it Beach Cafe? A. Beach Cafe, righto.

Q. What is that for, sir? [1295]

A. I have no idea. That was a concessionaire of ours. It could have been a refund or an adjustment of contract. It could have been many things.

Q. Can you help me with check No. 3939? That was in November of 1944.

A. Do you have a date on that, Mr. Christensen?

Q. Yes, sir; I have November 27, 1944.

A. That is made to Axtel Shibstey, a contractor.

Q. It is what, sir? A. A contractor.

Q. What was that for, do you know?

A. Well, I assume for some repairs or maintenance, as I know the gentleman well and I know he has also served us over a period of 10 or 12 years.

(Testimony of Wayne W. Dailard)

Q. Isn't there a memorandum there that that is for supplies, ballroom?

A. I don't see a memorandum here; no.

Q. Have you any record—

A. I think it says here "expense"—no, it doesn't. There is no identification of it here.

Q. Is there any place there where you would have any other reference to that check from those books so as to tell what it was for, sir?

A. Not that I know of; no. I think the only thing that would support this in our bookkeeping would be the vouchers [1296] and the paid invoices.

Q. Well, let us pass that for the moment and let us turn to Check No. 3953. A. 3953?

Q. Yes, sir.

A. To Pacific Square for \$250.00.

Q. That is from the Mission Beach ballroom to Pacific Square, is that right? A. Yes.

Q. What is that for?

A. Well, it could have been on a combination ad, where a portion of it was allocated to Mission Beach; it could have been on a billboard contract, some item which we frequently did, between the two operations, was to make a purchase by one and allocate the expense to the other. I notice this item is advertising. That is why I assume that it might be for radio; it might have been a radio contract, radio time, wherein we mention both operations and attempted to divide the proportionate share where it belonged.

(Testimony of Wayne W. Dailard)

Q. I notice a large number of the checks are made to the Beach Amusement Enterprises. Was there any practice in making out checks to yourself?

A. Oh, on obtaining change for the ballroom, many times it was handled in that way. If they needed three or four thousand dollars change for a weekend, that is common [1297] practice.

Q. Except for those large amounts would there be any reason that you can think of for—

A. Mr. Christensen, I told you I am not an auditor. If there is anything wrong with these books, I would like to know it. We will attempt to get any evidence that you want, but don't ask me things I can't answer, because I am not a bookkeeper and I am not an auditor.

Q. In spite of that, can you still tell me why a lot of checks were made to Beach Amusement Enterprises in amounts smaller than the couple of thousand dollars?

A. I assume there is some regular practice that brought it about. I can't offhand tell you; no. I know one thing: It is the practice that we draw checks to Pacific Square, Ltd., an operation I am much more familiar with, for our weekly change fund, because we clean out our safes on the weekend, and on Monday morning we make a check for three or four or five or ten thousand dollars, whatever is required for the change fund during the week. I have signed many of those. I assume the same practice was used in this operation.

Q. Let us take one or two of them and then you tell me if that would help you. Let us take Check No. 2406. Now, I have picked a small amount. A. 2406?

(Testimony of Wayne W. Dailard)

Q. Yes, sir. [1298]

A. In what year and what month?

Q. That was February 14 of 1944, and it is a small amount, and see if that will help you.

The Court: I think I should ask counsel for plaintiff what relevancy would that have to this case.

Mr. Christensen: I would like to know what some of these items of expense are which are charged up against his income as operating expenses, what items went into them.

The Court: What difference would that make in February of 1944 to this case?

Mr. Christensen: All right. I happened to pick one that is back quite a ways for illustration. Let us pick some others.

The Court: Any that are contemporaneous with the situation in San Diego with respect to this lease.

Mr. Christensen: All right.

The Court: Might be material, but I do not see how others that are anterior to any solicitation for bids or invitations for bids or bidding or acceptance of bids would be material. We are not trying an income tax case; we are trying this case.

Mr. Christensen: No. I will confine it now to a later period.

Q. Let us take, then, for illustration, check No. 3949, which was drawn on December 4th of 1944. [1299]

A. Well, that looks to me like it says some kinds of band expense. The amount is \$2,800, drawn on the 9th —no; drawn on the 4th.

(Testimony of Wayne W. Dailard)

Q. Isn't that just \$28.00, sir?

A. Yes. I beg your pardon. You are right.

Q. Does that help you now to tell me what that was for?

A. No. I have no idea, Mr. Christensen. The vouchers would clarify all those. If you would have asked for the vouchers, you could have had them.

Q. I notice that exactly one week later there is another check made to the Beach Amusement Enterprises in exactly the same amount, \$28.00, as represented by Check No. 3964. Would that help you to tell me what that is for?

A. No; it wouldn't help me a bit, sir.

Q. All right. I notice exactly one week thereafter there was another check in the same amount drawn to Beach Amusement Enterprises and represented by Check No. 3973; that is for the amount of \$28.00. Yes; there are three of them in a row. Would that help you any?

A. No.

Q. Let us take one week thereafter, December 26th, 1944, Check drawn to Beach Amusement Enterprises for \$28.00, represented by Check 4001. Would that help you?

A. No, sir. [1300]

Q. By Mr. Christensen: Check No. 3860, drawn to Music Corporation of America, on November 19, in the amount of \$725.00. What is that for?

A. Without looking at the check, I would say it is probably a deposit on a band.

Q. Well, did you make deposits on bands, sir?

A. Frequently, yes.



(Testimony of Wayne W. Dailard)

Q. Is that true of all of your checks drawn to Music Corporation of America, sir?

A. It could be for a deposit on a band; it could be for the completion on the percentage of the band's earnings; it could be for advertising material.

Q. You would have no independent memory as to what any of these checks to Music Corporation of America were for?

A. No. I only know that when we draw a check to Music Corporation of America it has got to represent either salaries, advances, or advertising costs. [1301]

Q. What kind of salaries are you talking about?

A. Band salaries.

Q. Well, don't you pay that to the band?

A. Not always.

Q. You pay it to the Music Corporation of America?

A. Occasionally.

Q. And they, in turn, pay the members of the—

A. That's right, sir.

Mr. Christensen: That is all I wanted to ask, sir.  
Thank you.

#### Redirect Examination

By Mr. Doherty:

Q. Mr. Dailard, this Exhibit P which you have been testifying from is headed, "Beach Amusement Enterprises"?

A. That is the company, the partnership that had the lease and operated Mission Beach.

(Testimony of Wayne W. Dailard)

Q. That is the name under which it was operated?

A. That is our company name, yes.

Q. Down at the bottom is a statement which shows, "Net profit for 1944 for Beach Amusement Enterprises, \$80,364.73"?      A. That is correct, sir.

Q. Was that amount reported to the federal government, the Internal Revenue Department?

A. Yes, sir. [1302]

Q. And was that amount upon which you paid taxes?

A. That is correct, sir.

Mr. Doherty: That is all.

Are you through now with the books?

Mr. Christensen: Yes. You may take them with you, Mr. Dailard, and thank you for helping us.

The Court: The defendant rests?

Mr. Doherty: The defendant now rests, your Honor.

The Court: Have you any rebuttal, Mr. Christensen?

Mr. Christensen: Yes.

The Court: If you have, I think we will defer it until this afternoon.

Mr. Christensen: Yes, I have some rebuttal, your Honor.

The Court: Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate.

(Whereupon, at 11:55 o'clock a. m., a recess was taken until 2:00 o'clock p. m. of the same day.) [1303]

Los Angeles, California, Monday, February 11, 1945.  
2 P. M.

The Court: All Present. Proceed.

Mr. Christensen: Mr. Desser, please.

ARTHUR A. DESSER,

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Arthur A. Desser, D-e-s-s-e-r.

By Mr. Christensen:

Q. Mr. Desser, your business, occupation or profession sir, is what? A. I am an attorney.

Q. Admitted to practice in all the courts of the State of California? A. I am, sir.

Q. You have been now for what period, sir?

A. Fifteen years.

Q. You are a member of the law firm of Desser, Rau & Christensen? A. I am, sir.

Q. You know Mr. Joe Ross, do you, sir?

A. Very well. [1304]

Q. Did you have a conversation with him on or about February 15th of last year, sir? A. I did.

Q. Was that conversation a personal conversation at his office, or was it by telephone?

A. I had had a personal conversation with him in his office on February 15th, but prior to that time I had several conversations with him.

Q. Do you recall the occasion when you first telephoned him, sir? A. That was February 2nd.

(Testimony of Arthur A. Desser)

Q. Did that conversation pertain to Finley or Mission Beach Amusement Center? A. It did, sir.

Q. Do you recall what was said on that occasion?

A. I called him and told him that we represented Finley, that Finley had been the successful bidder in obtaining the Mission Beach Amusement Center and Ballroom, that he was having a great deal of difficulty in obtaining bands, and there seemed to be some kind of a deal between the persons—the person or persons who had the ballroom previous to the time Finley had it and Music Corporation of America, and I called him because I knew he represented the Music Corporation. I told him—

Mr. Doherty: May I interrupt, your Honor? I object on [1305] the ground it is not proper rebuttal. It is part of the plaintiffs' main case, which they went into rather completely with Mr. Finley.

Mr. Christensen: It is offered in contradiction of the conversation which has been related here by Mr. Ross.

The Court: I think there may be a portion of it that may be rebuttal. That is what I was just looking for in the transcript, and you ought to use the transcript rather than to ask for a narrative in this omnibus character, because some of it will not be rebuttal. There is some that would be rebuttal, and that "some" occurred when Mr. Ross was on the stand.

Mr. Christensen: Yes, your Honor.

The Court: You have a transcript of this evidence, and it would be readily ascertained what would be rebuttal and what would not be rebuttal. Objection sustained.

(Testimony of Arthur A. Desser)

Q. By Mr. Christensen: Will you now state who was present at the time that you had the conversation with Mr. Ross in his office?

A. Mr. Ross, Mr. Finley and myself.

Q. Was that on or about February 15th of 1945, sir?

A. It was.

Q. Will you please relate the conversation?

A. I introduced Finley to Mr. Ross, and then Finley explained to him what was happening in connection with obtaining music for Mission Beach, and told him that he was suspicious [1306] of a deal between Bishop and Dailard. Ross said that could very well be true, that he did not trust Dailard and he had no confidence in Bishop. He said that Dailard had recently—putting it in his words—stolen some money from the—

Mr. Doherty: Just a moment. I object, your Honor, that that is a collateral issue.

Mr. Christensen: May I suggest that this is a matter for which the foundation was laid, as will be disclosed by an inspection of page 1229 and 1230 of the transcript, sir.

Mr. Doherty: You cannot impeach on a collateral issue.

The Court: Will you read the question, Miss Reporter?

(The record was read.)

The Court: Just a moment. That is collateral, that last statement. Nothing of that kind was elicited when Mr. Ross was on the stand. I mean as to the part he had just proceeded to relate. What he had related theretofore is rebuttal. This last part is a collateral matter and was not asked of Mr. Ross either.



(Testimony of Arthur A. Desser)

Mr. Christensen: May I invite the court's attention to line 24 on page 1229?

The Court: Read that again, Miss Reporter, please, the last portion of the answer?

(The portion referred to was read.)

The Court: Objection sustained.

Mr. Doherty: Will the jury be instructed to disregard it? [1307]

The Court: As to that last statement, ladies and gentlemen, you are instructed to disregard it and leave it out of consideration in the case. The rest of the answer that is given by the witness to the question will stand.

Mr. Christensen: Is the basis of it being collateral, your Honor?

The Court: Collateral and not rebuttal. There was nothing specifically like that. There was no specific matter such as this contained in the interrogation of this witness propounded or submitted to the other witness, Ross.

Mr. Christensen: Then it—

The Court: Do not argue it.

Q. By Mr. Christensen: Did Mr. Ross say that there was something with reference to finances which had occurred while Mr. Dailard was connected with Collonades in his management of Casino Gardens?

A. He did, sir.

Mr. Doherty: I object, your Honor, as not proper rebuttal, and especially, it is an attempt to impeach a witness on a collateral matter.

The Court: Overruled.

(Testimony of Arthur A. Desser)

Q. By Mr. Christensen: Your answer?

A. He did, sir.

Q. Did Mr. Ross say he was going to sue him, Dailard?

A. He said he was pressing a claim against Dailard.  
[1308]

Q. Subsequently did you become attorney for the Collonades? A. I did, sir.

Q. Did you take action against Mr. Dailard on account of the matter?

Mr. Doherty: Just a moment. I object on the ground it is not proper rebuttal; incompetent, irrelevant and immaterial, and outside the issues of the case.

The Court: Sustained.

Q. By Mr. Christensen: You received the file from Mr. Ross pertaining to Collonades, did you, sir?

A. I did, sir.

Q. And you did take action against Mr. Dailard?

Mr. Doherty: The same objection.

The Court: The same ruling. Sustained.

Mr. Christensen: Very well. You may examine, sir.

#### Cross Examination

By Mr. Warne:

Q. Mr. Desser, you represent the San Diego Journal, —is that the name of the paper? A. I do, sir.

Q. And you represent Mr. McKinnon?

A. I do, sir.

Q. You have an interest in this law suit?

A. No, sir. [1309]

Q. What? A. No, sir.

(Testimony of Arthur A. Desser)

Q. You do not? You drew the pleadings in the first instance in this case, did you not?

A. My office drew them, sir.

Q. Well, you signed the pleadings, did you not, as the attorney of record?      A. I probably did.

Mr. Warne: May I see the original file?

Mr. Christensen: I will stipulate he did, Mr. Warne.

Mr. Warne: You will stipulate that only Mr. Desser signed the complaint on behalf of your firm?

Mr. Christensen: That it is signed, "Desser, Rau & Christensen, by Arthur A. Desser," as attorneys for the plaintiff.

Mr. Warne: That the only individual appearing is Mr. Desser, as the attorney in that instance?

Mr. Christensen: Well, I think my statement there is—

Mr. Warne: Very well. I will take it.

Q. By Mr. Warne: Also, you signed the amended complaint, as the attorney for the plaintiff in this case, which was filed here the other day; do you remember that?      A. Yes, sir.

Q. You are familiar with the rules of this court, are you not, particularly Rule XI of the rules of this court being [1310] the Federal Rules of Civil Procedure?

Mr. Christensen: To which we object as being immaterial to any issue here presented.

Mr. Warne: It will become material.

The Court: It may be preliminary. Overruled.

Q. By Mr. Warne: This provision, particularly with reference to the signing of pleadings, is:

"That the signature of an attorney constitutes a certificate by him that he has read the pleadings, that to the

(Testimony of Arthur A. Desser)

best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay."

You are familiar with that rule?

Mr. Christensen: To which we object as being immaterial.

The Court: Overruled.

Mr. Warne: Whether he knows about it?

The Witness: Yes.

Q. By Mr. Warne: Did you at the time that you filed the complaint in this action, the original complaint, know that Mr. Finley had not suffered any damage whatever at that time?

Mr. Christensen: To which we object as being immaterial to any issue here and not proper cross examination.

The Court: Overruled.

The Witness: A. I don't believe that that is a statement [1311] of fact, Mr. Warne.

Q. By Mr. Warne: Well, I am asking you whether you knew that to be a fact.

A. I don't believe that is a fact, Mr. Warne.

Q. Did you know, at the time that you signed the amended complaint, which was filed here about two days ago in this court, that Mr. Finley had testified that at the time that he filed the original complaint he had not suffered any damage?

Mr. Christensen: To which we object as calling for a conclusion and opinion. Furthermore, that is not Mr. Finley's testimony on the witness stand here. Also, as being immaterial and not proper cross examination.

(Testimony of Arthur A. Desser)

The Court: Read the objection, please, Miss Reporter.  
(The objection was read.)

The Court: Without indicating what was Mr. Finley's testimony, or what was not his testimony, the objection is overruled.

Q. By Mr. Warne: Will you answer the question, please?

A. Would you mind reading the question, please?  
(The question was read.)

A. I think that is wishful thinking on your part, Mr. Warne.

The Court: No, that is not an answer to his question.

The Witness: A. I don't believe that to be a fact, Mr. [1312] Warne.

Q. By Mr. Warne: You do not believe that he so testified, or you didn't know about it?

A. I don't believe that he had not suffered any damage, Mr. Warne.

Mr. Warne: I did not ask that question. If I may be permitted, I would like to press the question.

The Court: Don't catechise the witness in any way. You propounded your questions to him, and he will answer them.

Mr. Warne: Thank you.

The Court: What is the question?

Q. By Mr. Warne: Mr. Desser,—

Mr. Christensen: Will you read the question, Miss Reporter?

Mr. Warne: There is no pending question.

Mr. Christensen: I am sorry.

Q. By Mr. Warne: Mr. Desser, I asked you the question of whether or not, when you filed the amended



(Testimony of Arthur A. Desser)

complaint, or signed the amended complaint the other day, you knew that Mr. Finley had testified in this action to this effect,—

Mr. Christensen: What page are you reading from?

Q. By Mr. Warne: (Continuing)—and I am reading now from page 745 of the transcript, the reporter's transcript in this case:

“Q. Respecting your damages in this case, I will [1313] direct”—and these are questions propounded to Mr. Finley on the stand in his own behalf—“Respecting your damages in this case, I will direct your attention to this one statement in your deposition, turning to page 189, beginning at line 16. This is the deposition taken upon October 8, 1945, of Larry Finley, in which you were represented by Mr. Rau.

“The Witness: Rau.

“Q. Rau, and the defendants were represented by Mr. Clore Warne; and I will ask you if these were not the questions and answers at that time—189, beginning at line 16:

“‘Q. By Mr. Warne: First, have you estimated that in any fixed number of dollars up to this time?’ Now, Mr. Warne previously had been asking about damages.”

Mr. Doherty is doing the questioning here.

“‘A. No; I haven't.

“‘Q. Did you at the time you brought this law suit, did you at that time compute the damages which you had suffered at that time? Answer yes or no.

“‘A. At that time I had no damages as yet. I could see damages coming.’”

Did you know he had so testified in this trial? [1314]

(Testimony of Arthur A. Desser)

Mr. Christensen: Just a moment. To which we object, that he has not so testified to those things. He was simply asked—

The Court: Let me see the page, please.

Mr. Warne: 745, your Honor.

The Court: Now, read the full question, please, Miss Reporter.

(The record was read.)

The Court: The question is too involved, Mr. Warne.

Mr. Warne: I agree, your Honor. May I withdraw it?

The Court: Yes.

Mr. Warne: Thank you. May I present this to the witness and ask him to read it.

Q. By Mr. Warne: I invite your attention, Mr. Desser, to the reporter's transcript in this case, commencing on page 745, at line 9, and ask you to read it, please, from there to and through line 3 on page 746.

A. I have read it.

Q. Did you know that Mr. Finley had so testified in the trial of this action at the time this amended complaint was filed?

The Court: The way that is phrased, that is also ambiguous. It is to me. I don't know. If the witness can answer, he should do so. Read it, and we will see if you have it the way you want it. I think I know what you have [1315] in mind, but whether your phraseology contains it, I don't know. I suggest we have it read so that you will be able to confirm it yourself.

Mr. Warne: Thank you. Would you read it, please?

(The question was read.)

(Testimony of Arthur A. Desser)

Mr. Warne: May I withdraw that and rephrase the question?

The Court: Yes.

Q. By Mr. Warne: Did you know those proceedings had been had and Mr. Finley had answered the questions as they were propounded to him upon the trial of this case?

A. I imagine he answered the questions as they were propounded, but I did not follow the daily testimony nor did I know what his answers were to each and every question.

Q. Did you know, in substance and effect, that he had said at the time you filed the amended complaint in this action that he had not suffered any damage?

A. I think that is a pleading of record.

Q. Did you know that fact?

A. Well, that is one of those questions like, "Have you quit beating your wife?"

Q. Is that the best answer you can give?

A. I think you are making a great play on words, Mr. Warne.

Q. Is that your answer? [1316]

A. I think that is the answer to your question, Mr. Warne.

Q. Well, let me ask you this, whether you did or did not know that fact, you signed the amended complaint here?

Mr. Christensen: I will so stipulate, Mr. Warne.

Q. By Mr. Warne: Is that correct? Is that your signature? A. Yes, that is my signature.

(Testimony of Arthur A. Desser)

Q. And that was presented to the court some days after the proceedings of Tuesday, February 5th, from which you have just read from the transcript; is that correct? A. I don't know the exact date.

Mr. Warne: You don't know. I see. You will stipulate it was filed thereafter?

Mr. Christensen: Whatever the date shows on there, Mr. Warne.

Mr. Warne: On the 6th day of February, it was, sir.

Mr. Christensen: If that is the date, yes, sir.

Q. By Mr. Warne: Now, of course, you read this complaint before you signed it, Mr. Desser?

A. Frankly, Mr. Warne, I believe that was prepared by one of my partners and it was presented to me for signature, and I am not in the habit of reading everything that they prepare. I assumed they knew what they were doing.

Q. In other words, in a law suit of this kind, where [1317] the rules, as I have read them to you, require you to certify that you have read it, you didn't read it; is that it?

A. Mr. Warne, I will be governed by whatever one of my partners said was correct.

Q. I am asking you about the fact. I am not asking you about the conditions.

Mr. Christensen: I object.

Mr. Warne: May I withdraw that, your Honor?

The Court: Yes. Don't get into any argument now. There are two lawyers here, remember, one on the stand and one examining the witness.

The Witness: If you will permit me to read it, I will determine whether I read it before signing it, but my

(Testimony of Arthur A. Desser)

offhand impression would be it was something presented by one of my partners for signature, and I believed he know what he was doing.

Q. By Mr. Warne: Well, did you mean to say or represent, in signing this pleading,—

A. It is an amended pleading.

Q. Yes, the amended complaint, Mr. Desser, this is the amended complaint,—did you mean at that time to say “that the plaintiffs had been damaged in the sum of \$1,000,000.00?”

A. I meant to say this, and if you will permit me to read it to the jury, you have asked me the question—

Q. You meant to say what? First, I will withdraw that [1318] question. Did you read it before you signed it, first? A. I meant to say—

Q. No. I am sorry to interrupt.

A. You have asked a question.

The Court: Just a moment, gentlemen. Just a moment.

Mr. Warne: I am sorry.

The Court: I have had so much experience with my brother lawyers as witnesses, I think I should interpose here to direct both of your attention to the fact that one is the witness and the other is the lawyer questioning. Now, conduct yourselves accordingly.

The Witness: Is there a question pending?

Q. By Mr. Warne: I will ask you to read paragraph VIII of the pleading, and I will propound a question; that is, of the amended complaint.

A. “As a result of”—



(Testimony of Arthur A. Desser)

Q. Just a moment. Read it to yourself, if you please.

Mr. Christensen: Paragraph VIII, Mr. Warne?

Mr. Warne: Correct.

The Witness: I have read it.

Q. By Mr. Warne: You have read paragraph VIII?

A. I have.

Q. Did you read this pleading, of this amended complaint, prior to the time that you signed it last week?

A. Yes, sir. [1319]

Q. Now, then, did you read paragraph IX?

A. Yes, sir.

Q. Paragraph IX recites—

Mr. Christensen: To which we object as not being proper cross examination.

Mr. Warne: I believe it will be, your Honor.

The Court: He said that he read paragraph IX, and paragraph IX is among the files of the court.

Mr. Warne: Correct.

The Court: Now, if that is an introductory to an interrogation,—

Mr. Warne: It is. I am not reading it to the jury.

The Court: All right.

Q. By Mr. Warne: You read at that time these words, and you have read just now these words, quoting from paragraph IX, "Plaintiffs"—

Mr. Christensen: To which we object as not being cross examination, your Honor. Your Honor has before you—

The Court: No, I haven't. The original file is not here.

Mr. Warne: May I hand it back?

(Testimony of Arthur A. Desser)

The Court: Paragraph IX is the subject-matter of the question, is it, Mr. Warne?

Mr. Warne: Yes, correct, your Honor.

The Court: That brings up the question, gentlemen, that [1320] is involved in the instructions, proposed instructions. I was going to interrogate counsel for each side on the question as to whether either of counsel thought that the subject-matter of paragraph IX of the amended complaint in this case was a jury matter.

Mr. Christensen: I was of the opinion that it would be for the court.

Mr. Warne: Of course, that wasn't the purpose of this question.

The Court: I know, but it is involved in the question; very much involved in the question. If it is your opinion, and if you are going to request that an instruction to the jury embody elements that are contained in paragraph IX of the amended complaint, I want to know it now.

Mr. Warner: Very frankly, my own position is that we have not discussed that at the moment. I have some personal views on it, in the state of the record as it is at the moment.

The Court: I shall not permit the question until the court is appraised of the position of both sides of this case on that subject, because if it is not a question that is a jury question, a factual question with the jury, then it would be prejudicial, in my judgment, to permit you to read it.

Mr. Warne: Without argument, may I suggest the basis on which I felt it would be proper? [1321]

(Testimony of Arthur A. Desser)

The Court: I don't know but what then it would be necessary for you to state in argument something that the court considers at this time would be prejudicial.

Mr. Warne: My whole purpose—

The Court: If you will come up to the bench, maybe I can explain what I mean.

(The following proceedings were had outside the hearing of the jury:)

Mr. Warne: My purpose is solely to show the interest of the witness in the outcome of the law suit.

The Court: You have a right to show that, but you should show it, I think, by generalized questions. If that is not a jury question or a proper subject-matter of inquiry before the jury, and you read that they are asking for \$100,000.00 in attorneys' fees, in my judgment, it would be highly prejudicial to do so, because they could ask for a million dollars if it is not a jury question and it would not make any difference what they asked for, because the court would pass on the question and the court would assess whatever the attorneys' fees might be.

Mr. Warne: My point is that the fact they are looking to the court or to the outcome of the law suit for any attorneys' fees is material.

The Court: It certainly is, as showing the interest of the witness on cross examination. [1322]

Mr. Warne: That is right.

The Court: To show that in this character of an action the law not only permits a recovery for damages, but if damages are recovered permits an allowance of reasonable attorneys' fees to the attorneys who prosecuted the

case. You have a right to propound a question of that kind, but not to read a figure which, in my judgment, would be extremely prejudicial, unless you have law to support the fact that the jury has the right to pass upon the question of attorneys' fees, which I don't think they have.

Mr. Collins: I don't know that there is any adjudication on it that way, that it is a jury question.

The Court: I don't believe it is. I think it is the same as any other question of attorneys' fees, unless the statute says that that issue can be submitted to the jury.

Mr. Collins: I can't recall anything of that kind.

The Court: In other words, how could a layman fix the attorneys' fees? True, if a lawyer is suing in the civil courts for a reasonable fee, then if he wants a jury to pass upon the question, the jury can hear the testimony pro and con and fix the fee. I don't know. I am just putting the question up to you because I want to know because it will be a vital matter in dealing with the instructions.

Mr. Collins: May I inquire this? They have a comparable provision in the Fair Labor Standards Act, and I don't [1323] recall. I tried some of those cases, but not before a jury. What is your Honor's experience?

The Court: I have tried them before the court, not with a jury. I think you can cover the point you have in mind without disclosing the amount that is asked for. That is the point that I think would be prejudicial.

Mr. Warne: Very well.

Mr. Christensen: Isn't that matter covered in—I have forgotten the name of the case, the same case in 140 Fed. (2d)—the case on damages?

Mr. Jaffe: The Bigelow case.

(Testimony of Arthur A. Desser)

Mr. Christensen: That is it. That sets forth the jury shall fix the compensation and the court is to fix the attorneys' fees.

The Court: What was that case?

Mr. Jaffe: The Bigelow case.

Mr. Warne: Very well. I will withdraw the question.

(Thereupon the proceedings were resumed within the hearing of the jury:)

By Mr. Warne:

Q. I will withdraw the pending question, and ask you this: at the time that you instituted this law suit, you knew the fact to be, did you not, that under a prosecution of this kind the plaintiffs might seek and there might be awarded to the plaintiffs attorneys' fees for prosecuting the [1324] action; is that correct?

The Witness: Am I permitted to answer that?

The Court: Yes.

The Witness: A. Yes, I knew that.

Q. By Mr. Warne: And in the complaint which you filed, the original complaint which was filed, you made a request that there be paid to the plaintiff, as it then was, Larry Finley, an amount of attorneys' fees for the services of yourself and your firm, Desser, Rau & Christensen, in the prosecution of the complaint in this action?

A. That's right, except this, that the award—

Q. I just asked you—

A. I haven't finished my answer.

Q. —what was in the complaint.

A. I haven't finished my answer.



(Testimony of Arthur A. Desser)

The Court: You are a witness now, remember, and not a lawyer. You have answered the question.

Q. By Mr. Warne: And when you filed and signed the amended complaint, paragraph IX of the amended complaint, which you say you read the other day, you again made claim and asserted that you wanted allowed to the plaintiffs, that is, Mr. and Mrs. Finley, an amount to compensate you and your firm as attorneys for the prosecution of this action; is that correct?

A. We requested that an award be made to the plaintiff [1325] to compensate him, to reimburse him, I should say, for the expenses that he would be put to in prosecuting this action, yes, sir.

Q. Is that the language that you used in the complaint which you signed?

Mr. Christensen: To which we object as not the best evidence.

Mr. Warne: I will read it, then, if the court please.

Mr. Christensen: To which we object as immaterial and not proper cross examination.

Mr. Warne: If the court please, I submit, and I will not argue it, I submit it is proper at this stage, in view of the witness' answer, to read the paragraph.

The Court: Read the last two or three questions and answers, Miss Reporter, please.

(The record was read.)

The Court: Objection overruled.

Mr. Warne: I am reading, if the court please, paragraph IX of the amended complaint:

"Plaintiffs, in order to enforce their rights against the defendants, have employed the services of Messrs. Desser,

(Testimony of Arthur A. Desser)

Rau & Christensen, a firm of attorneys in the city of Los Angeles, State of California, the members of whom are all licensed and authorized to practice before the District [1326] Courts of the United States, and under the laws of the United States, to-wit, Section 7 of the Sherman Act, plaintiffs are entitled to recover from the defendants a reasonable attorneys' fees, and that reasonable attorneys' fees in this action is the sum of \$100,000.00."

No further questions.

Mr. Christensen: I have no further questions. Thank you. You may step down.

Mr. Mirken, please.

LAWRENCE MIRKEN,

called as a witness by and on behalf of the plaintiffs, in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Lawrence Mirken, M-i-r-k-e-n.

By Mr. Christensen:

Q. Mr. Mirken, your business, occupation or profession is what, sir?

A. I am an attorney by profession. At the present time I am connected with Fox-West Coast Theatres.

Q. You formerly were employed by Mr. Finley, were you not?

A. I was associated with Mr. Finley, yes. [1327]

Q. That was with reference to the Trianon Ballroom, I believe, down at San Diego? A. Yes, sir.

(Testimony of Lawrence Mirken)

Q. Were you present on November 8th of 1944, which is the date the bid was let to Mr. Finley, and in the evening, at a time when Mr. Bishop and Mr. Howard and Mr. Finley were present and had a conversation?

A. I was.

Q. Do you recall that conversation now, sir?

A. I do.

Q. Will you please relate it?

A. Do you want the immediate conversation at which Mr. Bishop was present, or do you want the incident as it occurred?

Q. Well, perhaps for the continuity tell us the incident, as it occurred.

Mr. Doherty: Object on the ground it is not proper rebuttal, if it is going to be a broad cast question.

The Court: Sustained as too broad.

The Witness: I will answer the question directly, then.

Q. By Mr. Christensen: Please answer the question, sir.

A. On that date Mr. Bishop came up to the Trianon Ballroom. He had been preceded a short while before by Mr. Howard. At the time Mr. Bishop appeared in the ballroom, [1328] Mr. Howard was in the office talking to Mr. Finley. I recognize Mr. Bishop from having seen him that morning at the opening of bids in the City Council chambers of the City of San Diego, at which Mr. Finley had been awarded the Mission Beach Park lease. I went over to Mr. Bishop, and I told him that Mr. Howard and Mr. Finley were in the office, and that I would take him in to them. I went into the office with Mr. Bishop.

As I recall the conversation that took place, Mr. Bishop put out his hand, I believe, to shake hands with Mr. Fin-

(Testimony of Lawrence Mirken)

ley, and Mr. Finley said, "I don't want to talk to you," he said "anybody that would pull anything as low as what you did, I don't want the best part of." That was the general gist of the conversation.

Mr. Bishop said, "Well, I don't think I did anything I shouldn't have done."

And Mr. Finley said, "You did, in my opinion, the lowest thing that I have ever experienced." And Mr. Bishop said, "Well, I have got a right to do anything." He said, "Pacific Square is one of my best clients, and I have a right to do anything I want to do or see fit to do to protect Pacific Square."

Then there was some further conversation, and relative to the band situation, Mr. Bishop said, "Well, maybe we can get together to do some business." And Mr. Finley said, [1329] "If I have to do business with you personally, I would rather play phonograph records."

Then, as I recall,—there was a very bitter atmosphere around the entire conversation, because Mr. Finley didn't want to talk to Mr. Bishop originally. Mr. Howard had preceded him, and I tried to soften him up before Mr. Bishop got there. I had told Mr. Howard when he went in that Mr. Finley was not in a receptive mood to talk to Mr. Bishop. As he walked out—

Q. As he walked out. Who?

A. As Mr. Bishop walked out of the room, he said,—I am trying to think of the exact words he used because it impressed itself upon my mind at the time—

Q. Take your time.

A. I believe he said—oh, I remember now what happened. Mr. Bishop said to— Mr. Finley said to Mr.



(Testimony of Lawrence Mirken)

Bishop— before this conversation ended Mr. Finley said to Mr. Bishop, "Just what did you come here for?" And Mr. Bishop said, "Well, I will tell you," he said, "I came to make a deal with you to protect the Square."

That, as far as I recall, was the end of the conversation. Mr. Finley got up, we all got up and walked out of the room, and Mr. Bishop walked down the stairs. And Mr. Howard came up to me and sort of patted me on the arm and said, "We will smooth this thing over." And that is all I recall. [1330]

Mr. Christensen: You may examine, Mr. Doherty.

#### Cross Examination

By Mr. Doherty:

Q. Mr. Mirken, you were present in the City Council chambers on the morning of November 8th—

A. I was.

Q. — when the bid was awarded to Mr. Finley?

A. I was.

Q. And when did you go to the Trianon Ballroom that evening?

A. I believe I went to the Trianon Ballroom at the opening, which was about 7:00 or 7:30.

Q. Did you go there alone?

A. I do not recall whether I went alone or with Mr. Finley, or whether Mr. Finley joined me later. We frequently had dinner together and went to the ballroom together, and sometimes I had dinner myself and then Mr. Finley came up later.

Q. You were Mr. Finley's attorney, were you, in the matter before the—

A. No, I was not.



(Testimony of Lawrence Mirken)

Q. You just happened to go over to the City Council as a coincidence?

A. No. I had come along out from New York with Mr. Finley to act as assistant and advisor to him on other matters, [1331] and while I was in San Diego the Beach project came up, and I assisted Mr. Finley in preparing the bid which was subsequently submitted to the Council, such as the proof reading, and some of the material that was inserted, and things like that.

Q. Do you have your office in San Diego now?

A. No, I am not practicing law. I am not admitted in California. I am admitted in the State of New York.

Q. You do not practice law in California?

A. No, I do not.

Q. You met Mr. Finley in New York or on the train on the way out?

A. No, I have known Mr. Finley for a great many years, and I met him in New York before I came out.

Q. How many years have you known Mr. Finley?

A. Well, I would say at least twenty.

Q. How old are you now? A. I am thirty-eight.

Q. Since you were eighteen, and he was—

A. Well, I was younger, as a matter of fact. I met Mr. Finley in my freshman year in college. I think I was about sixteen and a half at the time.

Q. Did you go to school in Syracuse?

A. Yes, I did.

Q. Did you meet him in New York by appointment or [1332] accident?

A. No, I met him in New York—I saw him frequently on his visits to New York. When he came to New York to stay a while, I associated with him quite a bit.

(Testimony of Lawrence Mirken)

Q. Did you come west on the train with him?

A. No, he preceded me by about two weeks. I came later with my wife, and his wife and child.

Q. And you went down to San Diego together?

A. That's right.

Q. At that time he told you he was bidding for the so-called Mission Beach matter?

A. At that time I don't think the Mission Beach matter was even in question. We were interested at that time in a radio station.

Q. That is, the application for a radio station?

A. The application for a radio station, yes.

Q. Did you say you helped him prepare the bid for the City Council?

A. To a certain extent, yes.

Q. Would you recognize it if I showed it to you?

A. I think I would.

Q. This is Exhibit No. 8 (handing document to witness). A. This is it.

Q. Had you known Mr. Finley continuously during the twenty years? [1333] A. Yes.

Q. And you kept in contact with him during all of that time?

A. I would say perhaps once or twice a year.

Q. Once or twice a year. A. Yes.

Q. You knew him when he was a salesman for a jewelry firm up in New York State?

A. Yes, I knew him when he first started in the jewelry business.

Q. You knew him when he was in a jewelry store here in Los Angeles? A. I did.

(Testimony of Lawrence Mirken)

Mr. Christensen: That is objected to as immaterial and not proper cross examination.

The Court: Overruled.

Q. By Mr. Doherty: Did you know him when he worked for the jewelry store in Santa Monica?

A. I wouldn't recall whether he had or not. I was in New York all the time, and the times I saw Mr. Finley was the times he came to New York, or he wrote to me.

Q. You knew him when he was in the jewelry business in Burbank and North Hollywood? A. Yes.

Q. You read this application of Mr. Finley before he [1334] filed it, did you? A. I did.

Mr. Christensen: That is objected to as being not proper cross examination, your Honor.

The Court: It has been answered. I mean that question has been answered.

Mr. Christensen: Yes, I will not—

The Court: There is nothing before the court.

Q. By Mr. Doherty: Were you connected with Mr. Finley in the watch venture in New York?

Mr. Christensen: Objected to as being immaterial and not proper cross examination.

The Court: Sustained.

Q. By Mr. Doherty: Now, that evening, November 8, 1944, you and Mr. Finley had dinner together?

A. I didn't say that.

Q. Or you went to the ballroom together?

A. I said I don't recall whether I preceded him to the ballroom or whether we had dinner together.

Q. Anyhow, you met at the ballroom?

A. Yes, he was there.

(Testimony of Lawrence Mirken)

Q. At the Trianon? A. That's right, sir.

Q. And you both went into the office together, or you were in the office together? [1335]

A. No, Mr. Finley was at the far end of the hall, and Mr. Howard came into the Trianon. I was standing near the stairway, which is the entrance to the ballroom. It is on the second floor.

Q. Yes.

A. Mr. Howard was referred to me, and he told me that Mr. Bishop was coming down shortly, he would like to talk to Mr. Finley.

Q. Who told you who Mr. Howard was?

A. Mr. Howard introduced himself to me at that time.

Q. Who referred Mr. Howard to you?

A. One of our doormen. He asked for Mr. Finley, and was referred to me.

Q. What did Mr. Howard say to you when he came up to you?

A. He said, "I would like to speak to Larry, Mr. Bishop is on his way over, and he would like to talk to Larry."

I said to him at that time, "I don't think Larry wants to talk to him."

Q. That is what Mr. Finley said to you?

A. No, that is what I told to Mr. Howard.

Q. Then did you and Mr. Finley go into the office?

A. No, I went to the far part of the hall and got Mr. Finley. Mr. Finley came back with me and spoke to Mr. Howard, and he and Mr. Howard went into the office, and I went about [1336] my business. I had other things to do.

(Testimony of Lawrence Mirken)

Q. And Mr. Howard and Mr. Finley went into the office?  
A. Yes, sir.

Q. Then where did you go?

A. I stayed in the general vicinity of the outside of the office, which was the entrance to the ballroom.

Q. What did Mr. Bishop do?

A. Mr. Bishop was not there at the time. He came in a short time later.

Q. How long was Mr. Howard and Mr. Finley in the office before Mr. Bishop came?

A. Well, I wouldn't say very long. I would say perhaps five or ten minutes, to the best of my recollection.

Q. In the meantime, between the time that Mr. Howard and Mr. Finley went into the office, and before Mr. Bishop came, did you go into the office where Mr. Finley and Mr. Howard were?

A. I do not think I did, no.

Q. You were not present, then, during any part of the conversation between Mr. Howard and Mr. Finley?

A. No, I do not think I was.

Q. Then Mr. Bishop came?      A. That's right.

Q. What did he do when he came?

A. I recognized Mr. Bishop as he came up the stairs.  
[1337] As a matter of fact, I had been looking for him.

Q. At whose direction had you been looking for him?

A. I knew he was expected, and Larry asked me to wait until he came, I believe.

Q. How do you know he was expected?

A. I took the message from Mr. Howard that Mr. Bishop would be over very shortly.



(Testimony of Lawrence Mirken)

Q. Did Mr. Howard tell you to wait for Mr. Bishop and take him to the office?

A. No, I think Larry said, "Wait until he comes up here."

Q. What did Mr. Bishop do when he came up?

A. When he came up, I met him and I said, "They are in the office," meaning Mr. Howard and Mr. Finley, and I said, "You had better go in there." And we walked through and I opened the door and we all walked into the office.

Q. In other words, when Mr. Bishop came up, you brought him into the office?

A. That is my recollection. It is a very tiny office, and they may have come out of the office for a minute, but we all went back into the office.

Q. In other words, as Mr. Bishop came up the stairs you recognized him,—

A. Yes.

Q. — and you went up to speak to him?[1338]

A. That's right.

Q. You told him who you were?

A. That's right.

Q. And brought him directly over to Mr. Finley's office?

A. Yes. It wasn't a distance of over maybe five feet away from the top of the stairs.

Q. What band leader was playing there at that time?

A. I don't recall.

Q. There was a band playing there at that time?

A. Yes. We had a lot of bands at the Trianon.

(Testimony of Lawrence Mirken)

Q. Don't you remember that Mr. Bishop came up and went up and talked to the band leader?

A. He may have. He may have. I don't recollect, but he may have.

Q. Don't you remember Mr. Bishop, in addition to talking to the band leader, who I believe he stated in his testimony was Kenny Baker, had paced off the size of the room?

A. Not in my presence.

Q. Well, you saw him when he came up the stairs, didn't you?

A. Yes, I did.

Q. And you stated that you spoke to him when he came up the stairs, that you were looking for him?

A. I did.

Q. And you then took him over to Mr. Finley's office?  
[1339]

A. That is my recollection of what happened.

Q. He was not out of your sight, was he, between the time he came up the stairs and the time he and Mr. Finley met in the office?

A. I couldn't say. I don't believe he was.

Q. You don't remember him stepping off the floor space?

A. No, I definitely don't remember that, no.

Q. And you don't remember him walking over and talking to the band leader?

A. No, I don't.

Q. Now, when you went into the office did you all sit down?

A. I sat on the desk. Mr. Bishop, I believe, sat on the chair that was next to the desk, and Mr. Finley stood up. I believe before he stood up he pulled a chair in from a little outside office—he pulled the chair from the outside office into this office, which was nothing more than a cub-

(Testimony of Lawrence Mirken)

by-hole with a desk in it, and I think Mr. Howard sat in that chair. Mr. Finley stood at the far part of the room near the safe.

Q. How long were the four of you in the little office there, talking on this occasion?

A. I don't know. I would say anywhere between 15 minutes and a half hour. It might not have been that long.

Q. You were present during the entire conversation?  
[1340]

A. Yes, I was present during the entire conversation.

Q. Did you make any notes of what was said?

A. Nothing except to listen, which was—

Q. Just to listen? A. That's right.

Q. You made no written memorandum at the time?

A. No, I did not.

Q. You have read Mr. Finley's testimony in this case, haven't you? [1341]

A. I have not read Mr. Finley's testimony in this case.

Q. You have not read the transcript of the testimony given here?

A. No. It was brought up to me as I walked into the courtroom this morning and then taken right away before I was given an opportunity to read it.

Q. It was shown to you?

A. It was not shown to me. The entire transcript was handed to me and then taken away from me.

Q. You mean all these volumes were handed to you?

A. No; just one volume.

Q. Just one volume was handed to you; and who handed it to you? A. I believe Mr. Karp.

(Testimony of Lawrence Mirken)

Q. Did he tell you: "That is the testimony of Mr. Finley before this jury on this matter"?

A. Well, he said—I don't recall what he said. He said, "Read this," and that is all. I don't know whether it was Mr. Finley's testimony or Mr. Bishop's testimony or anyone else's.

Q. Then, when you came here today you did not know what you were going to testify to, did you?

A. Yes, I did.

Q. Who told you?

A. I spoke to Mr. Karp at the time I was subpoenaed.

[1342]

Q. When you were subpoenaed? A. Yes.

Q. When was that?

A. That was Saturday evening.

Q. Last Saturday? A. Yes.

Q. And it was suggested at the time that you be subpoenaed, wasn't it?

A. Mr. Karp called me up about two weeks ago and Mr. Karp asked me if I recalled being present at a conversation in the office at the Trianon.

Q. I am not asking you that. Wasn't it suggested to you that you be subpoenaed in this case?

A. No. I was told that I would be subpoenaed if they thought I would be needed.

Q. Was there any conversation to the effect that it would appear better as if you were here under subpoena rather than coming voluntarily?

A. No; there was no conversation to that effect at all.

Q. But you were talked to two weeks ago by one of the attorneys for the plaintiff? A. That is right.

(Testimony of Lawrence Mirken)

Q. But you were not subpoenaed until last Saturday?

A. That is right.

Q. Is that right? [1343] A. That is right.

Q. And you were talked to two weeks ago respecting a conversation to which you have just testified?

A. No. I believe I was talked to Saturday night with reference to the conversation. When I spoke to Mr. Karp two weeks ago, all he told me was that he had a subpoena for me and that I would be subpoenaed if they felt that my testimony was needed. Saturday night Mr. Karp came over to my house with the subpoena and told me that I would be subpoenaed to appear Monday morning.

Q. You had not seen—pardon me.

A. I am sorry, sir. That is all.

Q. You have not seen Mr. Finley during the past two weeks?

A. I have not seen Mr. Finley for, I think, more than three or four months, possible five months.

Q. Until when?

A. Until I walked into this courtroom this morning.

Q. And you haven't had any conversation with Mr. Finley? A. Not before that time; no.

Q. And you haven't been given any statement in writing as to what Mr. Finley testified to or what you were supposed to testify to?

A. I have not been given any writing; no, sir. [1344]



(Testimony of Lawrence Mirken)

Q. And what you have testified to here today is entirely out of your memory?

A. To the best of my recollection; yes, sir, the incidents.

Q. Without refreshing your memory from any notation?      A. That is right, sir.

Q. Without refreshing it from any conversation you had with Mr. Finley?      A. That is right.

Q. And without any reading of the transcript of the testimony?      A. Definitely.

Q. Other than the fact that you were shown the transcript and before you had a chance to read it this morning, it was taken away from you again?

A. That is right.

Q. And you have not seen it since?

A. I have not.

Q. Repeat again the conversation between Mr. Bishop and Mr. Finley on the occasion of November the 8th, 1944, in Mr. Finley's office in the Trianon ballroom in San Diego.

Mr. Christensen: To which we object as having been asked and answered.

The Court: Yes. We are not going over it again. Sustained. Objection sustained, Major. [1345]

Mr. Doherty: Well, I haven't asked him, your Honor. I thought I would. I don't want to over urge it.

The Court: You heard me, Major.

(Testimony of Lawrence Mirken)

Q. By Mr. Doherty: You have no connection with Mr. Finley at this time; just an old friend of 20 years?

A. That is right.

Q. Is that right? A. Yes.

Mr. Doherty: That is all.

Mr. Christensen: That is all. You may step down, sir. Your Honor, this witness told me he is desirous of getting back to San Diego, and may he be excused now?

The Court: Unless you gentlemen want him detained, he will be excused, gentlemen.

Mr. Warne: We do not want him detained.

The Court: You may go back, sir.

Mr. Christensen: May we take the recess now? I just want to ask Mr. Finley on one matter.

The Court: Ladies and gentlemen, we will take our afternoon recess for a few minutes. Remember the admonition. Remember the admonition and keep its terms inviolate.

(Short recess.)

The Court: All present. Proceed.

Mr. Christensen: I believe that I used the recess profitably, and now announce that we rest. [1346]

Mr. Doherty: If the court please, Mr. Warne called my attention to Exhibit L which was introduced the other day but has never been read to the jury. May I read it, your Honor?

The Court: Surely.

Mr. Doherty: A photostat of a communication from Larry Finley and Associates, dated:

"Mission Beach

"San Diego 8, Calif.

"December 11, 1945

"Honorable Mayor

"City Council and

"City Manager

"Civic Center

"San Diego

"California

"Gentlemen:

"Under the terms of the contract for the leasing of Mission Beach Amusement Center, it is stipulated that the Park shall be painted during the month of January.

"From experience learned last year when the park was painted, we found that the wind and rain during the winter season which is at its height during January, February and March, destroys the [1347] newness of the paint.

"In order that the Park might appear at its very best when it is patronized the most, we respectfully request that the Council pass a resolution setting the month of April as the date for painting rather than January.

"We feel that the City Council, as well as ourselves and the many citizens who visit Mission Beach in the summer time, will be much more pleased with the appearance of the Amusement Center if this action is taken. It is really not practical to paint the Park in January and then let it stand in the winter weather for three months with only a few visitors to observe its appearance.

"We will gratefully appreciate your courtesy in granting this request.

"Very truly yours

"Larry Finley & Associates

"Mission Beach Amusement Center

"(Signed) Warner Austin

"By Warner, Austin, Manager"

Marked: "Received December 11, 1945, City Manager."

Mr. Reporter, it is Exhibit L.

May it be stipulated, Mr. Christensen, that the stamp is the "City Manager of San Diego"? [1348]

Mr. Christensen: Oh, I assume that it is. I shall raise no question on the point.

Mr. Doherty: Defendants rest, your Honor.

The Court: Now, gentlemen, I would like to have you come to the bench for a moment.

Mr. Doherty: Do you want the reporter?

The Court: No; I do not know that we want the reporter.

(Short intermission while court and counsel confer.)

The Court: Ladies and gentlemen, the court has reached the point where it is necessary for counsel and the court to marshall the evidence and to also prepare proper instructions.

A case of this kind has legal features which require very close concentration to those applications of the legal principles that are involved, and also is a case that has an extended evidential aspect which requires on the part of counsel on each side a careful analysis and succinct arrangement of an argument so that it can be presented in

the time the court has allowed for the time of argument, which is not to exceed one and one-half hours on each side, that is to say, a total of not to exceed three hours. Of course, both counsel may be generous and may be very considerate and cooperative, and they need not take that hour and a half; but they may take that length of time in presenting the situation to the jury.

Now, in order to carry out the program as orderly as is [1349] consistent and proper under the circumstances of the case, I am going to ask you, when you come back on Wednesday morning—I am going to excuse you over tomorrow, which happens to be Lincoln's birthday, also, and then we will reconvene on Wednesday morning at ten o'clock. We will reconvene after the noon recess, at 1:30. Please remember that, because some of you may have appointments and would perhaps calculate on being here at the usual afternoon convening hour, which is two o'clock, but it will not be that on Wednesday; it will be 1:30 in the afternoon.

So that you are now excused, with the admonition particularly, again, ladies and gentlemen, that you are not to suffer yourselves to be spoken to or approached by any person concerning this case or anything involved in the trial of it; do not form or express any opinions on the case until it is finally submitted to you.

Please retire, ladies and gentlemen, and be here on Wednesday morning, the day after tomorrow, at ten o'clock.

(The jury retired from the courtroom.)

The Court: The record shows that all of the jurors are without hearing. Is there anything further, gentlemen, to be presented at this time?



Mr. Collins: If the court please, we have two motions to address to the court. I believe the first in the order of priority of procedure is a motion to strike. We move that [1350] the court strike all testimony and all evidence relating to damages and to profits and losses accruing at the Mission Beach ballroom from and after the 20th day of March, 1945, on the ground that all such evidence is incompetent, irrelevant and immaterial, and not within the proper issues of the case.

In developing that point, if the court please, we rely on the case of Connecticut Importing v. Frankfort Distilleries, the case reported in 101 Fed. (2d) page 79. I am sure the court is familiar with it and the doctrine which it announces, namely, that where the damages claimed in the business or property of a plaintiff results from or are alleged to result from acts or conduct committed prior to the filing of the action, the plaintiff is limited in recovery to damages alleged and proven to have accrued prior to the filing of the suit.

We submit that that is the situation in this case.

We further urge as separate and distinct from that ground, that all evidence relating to proof of damages at Mission Beach ballroom during the operation of plaintiffs, and on the basis of which a recovery is sought by them in the alternative, be stricken on the ground that all such evidence is speculative, conjectural, and would submit to the jury evidence from which they would only be able to arrive at a determination as a result of guesswork. [1351]

I will not detail the evidence, because I think the general reference is sufficiently in the mind of the court as to what the particulars referred to were.

The Court: You might state all of your motions, both contingent and absolute, before I attempt to rule on them.

Mr. Collins: Very well.

If the court please, at this time I present to the court and serve counsel for the plaintiffs with a motion for a directed verdict at the close of all the evidence, which motion is presented and urged on behalf of the defendants now in the case, namely, Music Corporation of America, the two individual defendants, H. E. Bishop and Lawrence Barnett.

If the court would choose to read them, it would save some time, I think.

(Short intermission.)

The Court: The court has read the motion for a directed verdict.

(Said motion for a directed verdict is in the words and figures following, to-wit:)

“The defendants, Music Corporation of America, H. E. Bishop, and Lawrence Barnett, collectively and separately, move the court for a directed verdict in their favor. The defendants move that the court, at the close of all the evidence presented at the trial of the above entitled action, instruct the jury to return a verdict in favor of each and all of the defendants on [1352] the following specific grounds to-wit:

“1. The evidence presented fails to establish, as a matter of fact, a prima-facie case, or any case, or claim or cause of action in respect of each of the following matters:

“(a) Any combination, conspiracy or agreement to restrain interstate commerce in so-called ‘name’ bands, as charged in plaintiffs’ amended complaint.

“(b) Any unreasonable restraint of interstate commerce in so-called ‘name’ bands.

“(c) Any detriment or injury to plaintiffs which directly or proximately resulted from any unlawful conduct on the part of the defendants or any of them as charged in plaintiffs’ amended complaint.

“(d) Any damage to plaintiffs of a nature or character capable of determination in any reasonable manner or of admeasurement in any monetary amount.

“2. The evidence presented fails to establish, as a matter of law, a claim or cause of action in respect of each of the following matters:

“(a) A combination, conspiracy, or agreement among the defendants or any of them, and Wayne Dailard, to restrain interstate commerce in so-called ‘name’ bands, in violation of Section 1, Title 15, United States Code.

“(b) The imposition of an unreasonable restraint, [1353] or any restraint, upon interstate commerce in so-called ‘name’ bands as the direct and proximate result of concerted action on the part of the defendants, or any of them, and Wayne Daillard.

“(c) Injury to the business or property of the plaintiffs by reason of anything forbidden in the federal anti-trust laws or committed by the defendants or any of them.

“(d) Damages to the plaintiffs of an ascertainable kind, degree or amount directly attributable to conduct on the part of the defendants in violation of the federal anti-trust laws.

“3. The defendants by this reference adopt hereat as additional grounds for this motion, each of the seven specific grounds stated in the Motion for Directed Verdict

made and presented by them at the close of the evidence offered by the plaintiffs.

“This motion is based upon the entire record at the close of all the evidence herein.”

Mr. Collins: The court will note in the motion, at page 2, we have stated as Paragraph 3 that we adopt by reference in this motion all of the grounds of the motion previously urged at the close of evidence on the plaintiffs' case. And in the interests of conserving time, I should like the court and counsel to accept the stipulation that I [1354] do now repeat and urge those same grounds in this motion. I do not think it will be necessary to re-state them and re-argue them in view of the court's prior statement of attitude with respect to them.

The Court: I think not, Mr. Collins.

Mr. Collins: As to the other items, there are some overlapping aspects; but we do call attention to the grounds upon which this motion is predicated, that both in point of fact and in point of law, plaintiffs have not shown a sufficiently substantial case for submission to the jury, either on the issue of a combination, of a conspiracy, of a concert of action on the part of defendants in this action and the alleged co-conspirator, Wayne Dailard.

That even if it may be argued that, for argument's sake, such a combination has been established, there has been an insubstantial showing and one not worthy to go to the jury on the effect of that combination or conspiracy, namely, that it is not shown to have resulted in restraint upon the trade or commerce of the plaintiffs in this action, or to have injured them in the conduct of their business.



Further, that even if it may be argued that there has been shown both to be a combination and a conspiracy, and that restraints have been effectuated through it, there is no proof of damage; and when I say "damage" I mean monetary damage, damage of a character, of a type, of a degree that [1355] this jury could reflect in an award in a monetary sum.

And I do repeat one of the points urged in our original motion, that the very subject matter out of which the damages are urged to have flown is so transitory, so nebulous, so ephemeral as to not be a proper subject matter for the jury to consider whether any damages attach to it, namely, so-called name bands.

We make this motion not on that basis of our original motion in the light of the evidence as it existed at the close of plaintiffs' case, but in the light of all the evidence that has gone into the record and that is before the court and which must be before the court for the consideration of this motion.

We do repeat and urge that it is so insubstantial on all of the issues, all of which would have to be affirmatively decided in favor of the plaintiffs to support a recovery, it is so insubstantial that there is no basis upon which a verdict could properly stand.

I submit the motion without any further argument or reference to the law.

The Court: Mr. Christensen, I want to hear from you on the applicability of *Connecticut Importing Company v. Frankfort Distilleries*, 101 Fed. (2d) at page 79, upon the measures of damages that are applicable, if any, in this case.



Mr. Christensen: I have not read that case recently.  
[1356]

The Court: If you desire to read it, hand it to him,  
Mr. Clerk.

(Short intermission.)

Mr. Christensen: Mr. Karp has very carefully considered them and has invited my attention to some other cases. I think we might save time on it by letting him state his views.

The Court: There is an earlier case, *Lawlor v. Loewe*, in 235, I think, United States, which is the basic case, and that is a Second Circuit Court case in a very recent decision.

Mr. Christensen: Go ahead, Mr. Karp, and I will be reading this through and do what I can.

The Court: The case that I have just referred to, I suppose you are familiar with it, also, 235 U. S. at page 520-522, *Lawlor v. Loewe*.

Mr. Christensen: Shall Mr. Karp proceed, your Honor?

The Court: Yes, surely, Mr. Karp.

Mr. Karp: If your Honor please, in our consideration of *Connecticut Importing Co. v. Frankfort Distilleries* case, we believe that the distinguishing feature is the fact that in that case the court said that where the actions are continuous, where the actions complained of continue to be incurred, then the damages which are suffered are only assessable to the time the action is commenced; and if injuries which result after the action is commenced do result of these continuing actions, [1357] an additional action must be brought.

However, in our case we feel that our injury suffered as a result of the original conspiracy and action which took place prior to the time of the commencement of our action, and under the Eastman Kodak case, in our action to recover damages the future profits which would have been made but for the defendants' practices could be shown by past experience. And the court in that case said:

"The plaintiff had an established business and the future profits could be shown by past experience. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate. The defendant whose wrongful act creates the difficulty is not entitled to complain when the amount of damages cannot be accurately fixed."

This action is like a tort action. We are asking for the damages as a result of this conspiracy which took place prior to the commencement of our action. As a result of that conspiracy we not only lost the immediate profits which we would have incurred if we had gotten the name bands up to March 20th, but as a result, the reputation of the Beach and the people coming out here, as has been testified to, to dance as a habit. We were not able to establish and continue [1358] the good will of the Beach out there, and therefore our future injuries are a result of those acts, not as a result of the continuous acts. It is not like trespass; it is more like a tort. Our injuries, both the past, present and future are the result of this conspiracy which took place prior to the date of the commencement of this action; and that theory is the theory upon which we believe that the damages which were suffered should be assessed, not only up to the time of the

commencement of the action, but our future damages should be assessed under the Eastman case.

And also, under the Clark Oil Co. v. Phillips Petroleum Co., which is a recent case, 148 Fed. (2d) 580, the court said: An action for treble damages under this section is based upon tort. The amount of compensatory damages is not fixed by this section, but such damages are unliquidated—

The Court: What was that citation, 148 Fed. (2d)?

Mr. Karp: 580, Clark Oil Co. v. Phillips Petroleum Company.

The Court: Well, that is a very serious question in the case, I think, gentlemen. I think there may be factual questions there that make it necessary to cover the situation by an instruction. I called attention to Exhibit K in the case.

Mr. Christensen: May I invite your attention—

The Court: It may be that the interpretation of Exhibit [1359] K is a factual question. This is the letter of February 27, 1945 to Mr. Finley. The exhibit simply has the name in the corner "Hal Howard." I think evidence showed how the original letter which was transmitted was signed. This letter reads thus:

"Dear Larry:

"Confirming our telephone conversation of today where-by you were submitted Bob Chester and His Orchestra for March 16, 17, and 18 at \$2,500.00 against 50%; Jack Teagarden for March 30, 31, and April 1 at \$2,500.00 against 50%; and Ted FioRito on March 23, 24 and 25 and-or March 30, 31, and April 1 for \$2,500.00 against 50% each series of three nights.

"These attractions have done well on engagements not only in your territory in the past but throughout the country and have established reputations and prices in line with those which we are quoting.

"During a prior conversation that I had with you you advised you would possibly operate three nights a week. On bands the caliber of those we are discussing, as there are few engagements in this territory to fill up the early week days, the weekend dates must at least cover the operating expense and minimum salary of the organization or, of course, it is to our interest and that of the band's to route them out of the territory, [1360] where they could possibly play five or six engagements a week, thus realizing considerably more for their services than if they played off in order to play your weekend engagement, and that is why there is little difference between a two-day and three-day price.

"I am sure that the Curt Sykes orchestra would have been a good suggestion for you for Ratcliffe's; however, I understand that this booking has been filled.

"As we are now making plans for the itineraries on these bands, in case you desire to reconsider your refusal, it is important that you communicate with us at once.

"Yours very truly."

It may be that that letter, together with other correlated oral testimony in the case, would make it necessary for the court to prepare an instruction that meets with the factual situation before the court in this case and the principle announced by the Second Circuit in *Connecticut Importing Company v. Frankfort Distilleries*. [1361]

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In that case the court said on the subject under consideration:

"Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought." Citing a case. "Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was commenced." Citing *Lawlor v. Loewe*, 235 U. S. 522. "Here the plaintiff's damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative."

Now, here is a letter dated in February of 1945, and I am [1362] not passing on the weight of it, as that may be a factual question under all of the evidence, but here is a letter in which there is tendered to the plaintiff certain bands. Moreover, there is in the letter a request of an answer from him, a reply of some kind from him. If the evidence discloses a reply, either directly or by inference, then I think probably it is a factual question for the jury to determine whether or not the acts which give rise to damages had from their nature to be committed after the date of the letter in question, Exhibit K.



The whole situation with respect to damages, as far as subsequent acts are concerned in this case in my judgment is—and not decisively, but the mind of the court is pretty well settled on it—that unless this be a continuing conspiracy, or, first, unless there be sufficient evidence to warrant the jury in finding a conspiracy, and that I think is essentially a factual question in this case, unless there be sufficient evidence to warrant the finding of a conspiracy from a preponderance of the evidence, then upon that phase of the case there would be no damages allowable. That, of course, would not dispose of the other phase of the case, which is not predicated upon the same elements of conspiracy, but which is predicated upon a combination to produce monopoly in interstate commerce. If the conspiracy, if established, was terminated by the acts that occurred on February 27, 1945, [1363] then so far as that conspiracy feature of the case is concerned there could be no damages assessed beyond that date for two reasons; first, the conspiracy then was culminated, terminated, and if the damages are to be awarded upon the theory of conspiracy, they could only be sustained while the conspiracy was operative. If a co-conspirator, an alleged co-conspirator, had by an affirmative act, indicated abandonment of any unlawful combination, or agreement, or conspiracy, then unless the plaintiff had taken some action which indicated that he was not acquiescing in the intendments and inferences that would be deducible from this letter of February 27th, he would be confined in any damages to acts which occurred prior to that date. That, of course, does not answer the question as to whether or not damages would be assessable for any tortuous acts that might have been jointly committed by the defendants, or any of them, prior to that date which are not based upon a conspiracy.

In other words, there are two features to the case. One is an alleged conspiracy to violate the anti-trust law; an unlawful agreement, a combination, a concerted action, by the defendants in the case at this time with Mr. Dailard. The other is not predicated upon the same conspiracy elements, but upon joint unlawful acts of the defendants with Dailard, which themselves, if established to the proper degree of proof, and if they affect interstate activities, I am inclined to think, the court having ruled on [1364] the interstate character of the transaction, it makes it a question of law, and then such damages may be allowed as are shown to have been in furtherance of and in continuance of the joint unlawful acts which the jury may conclude were committed prior to the February date, and which continued thereafter notwithstanding the terms of the letter.

I hope I make that clear, because it is a serious question in the court's mind as to just what the measure of damages will be here, and where the differences are to be drawn.

Mr. Collins: Could I interrupt and make one observation, your Honor?

The Court: Yes.

Mr. Collins: I am not clear on the point the court has made because it is so at variance with my understanding of the pleadings, that there are two approaches, one, the theory of a combination and conspiracy and the other would be acts independent of a combination and conspiracy on the part of the defendants. As I conceive the case, the warp and woof is predicated upon a combination, that it is a conspiracy case, and that there could not be any violation of the anti-trust laws by these defendants in a form

that would give the plaintiffs a basis for relief unless it was established—

The Court: There must be a concerted action, of course, by two people. [1365]

Mr. Collins: Yes, but I understood the court to mean they were acting independently in some other tortuous way that could reach the same result.

The Court: The case is brought under the first and second subdivisions of the Sherman Act.

Mr. Collins: I don't want to argue the case with the court, but I think a close examination will not show that to be the fact.

The Court: You argued that before, didn't you, Mr. Collins?

Mr. Collins: I did, your Honor.

The Court: I don't think there is any necessity for re-viewing that, because the court's mind is made up upon that.

Mr. Collins: If I may labor the matter for one further comment. A section 2 case would be a monopoly case. This is a case of an alleged conspiracy or a combination to restrain trade, and I think we have tried it on that theory.

The Court: Have you finished now?

Mr. Collins: Yes. I am sorry.

The Court: I think this letter is a very essential feature in the case as to when, if damages are assessable at all, as to when that would be, at what point. There may be a question as to the bona fides of this letter, whether or not it was a letter that was designed to accomplish a purpose that had already been perpetrated. That is a factual [1366] matter. That is not a matter for the court at this stage of the case, in any event, to pass upon. It is a factual matter that the trier of the facts must determine.

I shall have to go over the matter a little more carefully before the court determines just what the instructions should be. As to this requested instruction No. 20, I think it is, which the plaintiff requested, I think that is too broad in this case. As I remember, it is simply a copy of the language of Justice Holmes in an opinion in the Loewe case. That is what it is, isn't it?

Mr. Jaffe: That is right.

The Court: I don't believe it is proper to pick a statement out of an opinion in a case in the Supreme Court and to give that in a subsequent case. It is true that there is a principle there, but I have just read from this Second Circuit Court of Appeals case which somewhat departs from that principle.

Mr. Doherty: May I make one brief statement, your Honor, on the factual matter? If there is one fact that is agreed to by all sides in this case, it is this, that each engagement of each band leader is a separate engagement.

The Court: I am not going to pass upon that. That is for the jury; that one thing.

Mr. Doherty: What I had in mind was this, from the Connecticut case, that each time there was a refusal, it is a [1367] cause of action; and that the Connecticut case, when you read the cases upon which it was based, it shows that each refusal is a cause of action and you can only recover on the refusals that happened up to the time that the action was commenced, and that each subsequent refusal is a new cause of action. The statute begins to run upon each refusal in the future, and any basis of damages for refusal to act after the action is commenced, under the Connecticut Distilleries case, is speculative and cannot be recovered in the original action. It means a subsequent



action must be filed, and a subsequent action takes into consideration the subsequent refusals, the independent new cause of action that arose with each refusal.

The Court: Don't you think that the bona fides of the refusal come into the case?

Mr. Doherty: The bona fides always come into it. But assuming all of the refusals up to March 20th were in bad faith and assuming all after March 20th were in bad faith, they are still separate, distinct refusals and separate, distinct causes of action.

The Court: Wouldn't it be that unless they are the result of concerted action or a combination that existed generally for the purpose of depriving the plaintiff of bands of the type that are described in the evidence?

Mr. Doherty: That would be entirely true if there was [1368] any evidence in this case that there was an agreement between Mr. Dailard and M.C.A., in which the band leader was a part. There is no evidence here by a single band leader in this case that he was a party to any arrangement to deprive Mission Beach of an engagement. In other words, this is a conspiracy that is not capable of being carried out without the concert of a third party, namely, a band leader.

The Court: Yes, but do you think that it is necessary to have direct evidence of the activity of the band leader in the concerted understanding? Can't it be done by indirect evidence, circumstantial evidence?

Mr. Doherty: Yes, your Honor, you can prove it by indirect evidence, by circumstantial evidence, and by inferences from either.

The Court: Yes.

Mr. Doherty: But there is not a word of testimony here that M.C.A. ever said to a band leader that he should



not play, with the two exceptions and they both failed. That was when the suggestion was made to Tommy Dorsey that he not play at Mission Beach, and that failed, that did not influence the band leader there. The other was the band leader that played there on New Year's Day—

Mr. Warne: Charlie Barnet.

Mr. Doherty: Charley Barnet,—that the suggestion was made to him. There is not a single inference that you can [1369] draw from a single fact shown that a band leader was ever approached, except in those two instances, and both instances failed. On the other instances the matter is wide open and not the slightest intimation that M.C.A. ever went to a band leader and said, "Don't play at Mission Beach."

The Court: No direct evidence, but there are circumstances, and I am speaking now of the factual situation, not of the determination that should be made by the trier of the fact, but there are factual situations here that may be sufficient to justify the inferences that the inactivity, the dormancy, the disinclination of the defendant corporation was a motivating circumstance which caused or brought about the result that ensued in not obtaining bands which the plaintiff asserts he should have been able to get, provided there was a competitive field and a non-monopolistic environment in which the supplying of bands was furnished by the booking agencies, which the evidence indicates were tied up in factual ways with the band leaders.

Mr. Doherty: My argument is premised on the basis, your Honor, that there was no competition, that all of the bands were controlled by M.C.A., and when I say "controlled", I mean they acted as employment agent. Assuming that to be the fact, there is not one iota of evi-

dence, either direct or circumstantial, from which an inference may be drawn that any band leader was told that you must not or should not play [1370] at Mission Beach, or that was ever influenced by it.

The Court: There is no direct evidence, that is true. I am not going to argue it from the standpoint of counsel on the other side.

Mr. Warne: If the court please, might I be permitted an observation with respect to the law aspect?

The Court: On the question of damages?

Mr. Warne: No, not on the question of damages.

The Court: I am not going to give an expression on the facts.

Mr. Warne: Not on the facts, a pure law question, a law question which was adverted to by your Honor in part in ruling on the motion which was argued the other day by Mr. Collins, and that is the provision of the act, which is now 15 U. S. Code, that is, that the labor of a human being is not an article or commodity of commerce.

That was argued, in part, and it was my understanding that your Honor replied to it, or at least observed in ruling, put it that way, that the Baseball case which had been cited on that point, in part, on the motion, was perhaps not good law at the present time in view of the changed conditions of our economy.

The Court: That is right.

Mr. Warne: Now, I have wanted to make this comment with reference to this particular provision of the act: it is [1371] my recollection, first, that that provision of the act was not in the act at the time of the Baseball decision by Justice Holmes. In other words, this was in 1914 that this was adopted, and in that regard I want to invite your attention particularly to the ruling, or, what

is in effect the ruling of the Supreme Court in the American Federation of Musicians case. Your Honor will recall that, perhaps.

The Court: What is the citation?

Mr. Warne: 47 Fed. Supp. 304. In that case your Honor will recall the government brought a restraint case against the American Federation of Musicians. The action went off on a motion to dismiss. The bill was full and complete, and affidavits were full and complete. It was before the trial court, and it was commented upon at very considerable length. The Supreme Court affirmed the judgment in a memorandum. My thought there is this, that essentially what is being dealt with here is the labor of human beings, let's put it that way, a band leader, his featured assistants, if you please, and the musicians who perform. We are acting, that is to say, Music Corporation of America is acting only in selling that, in selling those particular services. That, I submit, is what they are selling, and it is only that, the labor, and when I say "labor", I mean their particular artistry and everything that goes with it.

The Court: That is different. [1372]

Mr. Warne: Well, their artistry is labor. In one sense of the Baseball case, in the sense, if you please, and it wasn't Babe Ruth in those days, but, as your Honor remembers, it was Wagner and LaJoie and some of the rest of them, they were dealing there with essentially the services of human beings. It is true that wasn't decided in that case, and, therefore, the case does not control either way.

I would be inclined to agree with your Honor as to the interstate features of the Justice Holmes decision, but here, I submit, that as the law proposes, essentially what we are

engaged in is the business of representing band leaders and the musicians who play with him in the finding of opportunities for employment and the making of contracts for their employment, and I submit, your Honor, that that is labor, and I submit it is essentially labor within the meaning of this particular provision of the act.

The Court: I wish I could agree with you, under the decisions of the Supreme Court of the United States. I think your philosophy is a philosophy that I would like to adopt, but it isn't the philosophy of the times. Let me point out why. I tried to the other day, but probably did it in a rather nebulous way.

The communication media in present-day activities are not the same as those in the days of the Baseball case or in the days of the Keith case. I think we had no radio in [1373] those days. We probably had the phonograph. I think we did, probably the old Edison disc.

Mr. Doherty: A kind of one.

The Court: Yes.

Mr. Jaffe: A home Gramophone.

The Court: They did not have these media of communication which we have today. In those periods a band was, as I think one of the witnesses in this case properly testified, an aggregation of musicians who played brass instruments and went down the street at the head of a procession. The other term was a string orchestra. I don't know, I suppose symphonies were in existence then. I think probably they were, that is, musical assemblies that gave interpretative music. It is not merely the playing of the instrument that makes the symphonic music. It is the interpretation, the telling of a story through music, notes, in addition to the sonorous effects of instruments.



The same thing is true, in my judgment, in these public entertainment features today. It is the element of talent which is an intangible. It is hard to appraise talent. It is something that is indefinable. It may exist in a person of physical attractions and yet who has very little mental superiority. It may exist in one who has no intellectual training and yet has great physical attractiveness and depends on the physical factors in the human being for his achievements. [1374] On the other hand, it may be that the performer has no physical attraction but has a tremendous supply of, shall we call it, spiritual or ethical or inward attitudes that are manifested in entertainment.

Now, under present-day methods those features are exploited through organized media. Where the talent was exhibited, or the labor was exhibited, in the days of the Baseball case, to maybe 10,000 people, and I don't know whether the Yankee Stadium in those days had the seating capacity it has today, but supposing it had and supposing it had a capacity of 50,000 people, today during the World Series there are 50,000,000 people that hear it. Now, why? Because of the organized entities that, by virtue of combinations of capital and enterprise and initiative, have organized systems of interstate communication. There is a big difference between the band leader who becomes popular because of his personality and the one who may be a great musician. I think Mr. Stein illustrated that in his testimony very nicely. Now, what is it that makes the individual with his gymnastic performances and his athletic manifestations, a name band, or that makes his band a name band, or a top band, as the nomenclature is in this case? In my judgment, it is the exploitation that he gets through this media I am speaking of. That was not true with Babe Ruth. People



go out to see the Yankees, or did go out to see the Yankees play ball because Babe Ruth [1375] was going to knock a home run, or they thought he was; that he was going to use, not necessarily his talent, but his skill, his eye of precision in striking at a ball at the right moment and in the right way.

I don't see any similarity, any analogy, between that and the band leader whose band gets its reputation not because he is a great musician or because he is possessed of those great talents, but because, by virtue of exploitation and by virtue of the initiative and the business acumen, and also the capital, through the use of those features he becomes well known. The people who listen over the radio, who like to dance, listen to him, listen to his music, but it isn't that music alone that attracts them. The feature is presented by the broadcasting company and by the announcers, and by other manifestations that occur in the ballroom where he is performing, and that goes out over the air, over the ether, and it is those means that make him available as a business asset.

Mr. Warne: May I be permitted one additional observation, going to this very same matter, your Honor? I tried to say, as I stopped, that I did not want to press or to argue the interstate features of the operation, which is reflected in the media now available and now used for the dissemination, shall we say, of the product of labor of these particular persons, but again I invite your Honor to read particularly the facts that were alleged by the government [1376] in the American Federation of Musicians case. There the government contended very definitely that when the Federation of Musicians said that the musicians should not make records—and, remem-

ber, these records are made by these same band leaders, it is the same element, shall we say, the same media, so to speak, and they are doing the same thing, they are making records which again go out over the air and which are sold as records—the government contended that when they notified the musicians that the musicians should not make records for Decca and Victor, and the other record companies, then they were not engaged in their efforts as a labor organization, they were not dealing in the subject of labor, and that, therefore, they were dealing in a commodity subject to the act. In affirming the judgment of the trial court, it seems to me that the Supreme Court took the position that there was soundness in the argument.

As I say here, we are charged in this complaint not with restraining the dissemination by any media whatsoever of any product which is salable or which results in any loss or damage to the plaintiff in this case, we are charged only with this: we are charged with representing name bands or orchestras, or, rather, the leaders of name bands and orchestras and preventing, by reason of our alleged representations, acts, et cetera, leaders and their bands in playing at a given place, that is to say, at Mr. Finley's place in San Diego, [1377] at Mission Beach.

Now, I say, and again I want to discount entirely the interstate feature of it, I want to say that we are charged here with unlawfully restraining the sale, so to speak, of

the labor of human beings. And I say that under the specific interdiction of the statute itself that that cannot be a commodity or cannot be considered a commodity which can be traded in and made the subject of such a suit.

Now, I want to differentiate again from this problem of the interstate quality of it. I am trying to refer only to the essential quality of what is involved in the use of the term "selling." They use the term "selling." If your Honor will examine the evidence here of the American Federation of Musicians licensing agreement, in the provisions under which we act as agents, you will find that we act only in a representative capacity. We don't sell a commodity. We haven't a commodity for sale. We are representing human beings,—workers, if you please—the same kind of workers that would not work for Decca when the A. F. of M.—and in the newspaper it was Mr. Petrillo, but the executive board and officers in the convention decided they would not make records for Decca, and there the Supreme Court said they were not dealing with a commodity, but with the labor of a human being.

Now, I wish to submit, your Honor, one other comment, if [1378] I may, on the *Ring v. Pina* case, to which your Honor adverted. In that case your Honor will recall that the point was made, and I want to invite your Honor's attention to the fact where it mentions that it was ruled out by the Third Circuit, it was ruled out by reason of the fact essentially that the playwrights there who had banded together under the Authors League

by their agreement referred to something which was a specific commodity, namely, the manuscript of a play, and if your Honor will recall, it turned on the right to make certain changes in the script, under the provisions of the contract, and the basic agreement, as it was called was held to be violative of this act, and that no changes could be made without the author's consent. They were dealing with a specific commodity, and the court so stated, that it was a tangible thing. They were not dealing with the services of a human being. I think very serious consideration should be given to the fact to which I have adverted.

The Court: It is an important feature. I tried to say the other day, and I still want to reiterate, that the line of demarcation is very close, very difficult, because of the present-day integration of activities. Labor, personal service, is so interwoven with transportation, communication, business, interrelated entities, that it is hard to separate what is purely a local matter from an interstate matter, particularly in the entertainment field, I believe. [1379] The composition of a musical score involves labor, but that is not all that makes it profitable today. The composer may be learned, erudite, highly talented musically, phenomenal, and yet unless there is something else, his talents may be noted by but a very few people.

We are talking about economics. We are not talking about purely philosophical, or ethical or musical affairs.



We are talking about economics, business, commerce, and it is that feature that I think makes it very difficult to determine with precision just what is intrastate and what is interstate during these times.

Mr. Warne: Your Honor is familiar, of course, with the American Medical Association case, which did not acquire an interstate feature, it being a District of Columbia case, where some of this argument was made, and where it seemed to me, and I am referring to that again, the court very definitely went into the agreement between the parties. The agreement between the parties involved the refusal by the parties, namely, the physicians, to serve a hospital, and referred in that instance to a business, a particular business which was in the District.

Now, I have in mind that here there is no charge on our part of any conspiracy or any agreement along with the musicians or along with any other persons of that character in connection with the rendering of these so-called—of [1380] what we have agreed, or which I contend, rather, is the labor of human beings despite the fact of its artistry or because it may be of an artistic nature. Thank you.

The Court: The motion to strike will be reserved because that involves a feature that I have been discussing on damages. I shall rule on that, and probably shall be able to announce a ruling tomorrow at 3:00 o'clock, when we meet. If not then, before the argument on Wednesday morning at 10:00 o'clock.



The second specification of the motions, that the damages are speculative and conjectural, is not well taken and the motion is denied as to that.

The motion for a directed verdict is likewise denied as to all defendants.

That simply leaves undetermined at this time, gentlemen, the question as to the proper measure of damages, and the proper instruction to the jury as to what damages, if any, may be assessed. I shall try to reach a conclusion on that by tomorrow at 3:00 o'clock.

Mr. Collins: Before the court adjourns we should like to present some written objections to the plaintiffs' instructions, and if I might note it, these are only to one to twenty-nine, inclusive. We did not have the additional instructions at the time this was prepared.

The Court: I did not receive any written objections to [1381] the instructions proposed by the defendants.

Mr. Christensen: He says he does not as yet have them.

The Court: I ought to have those so I will know what the positions are.

Three o'clock tomorrow afternoon, gentlemen.

(Whereupon, at 4:45 o'clock p. m., Monday, February 11, 1946, an adjournment was taken until 3:00 o'clock p. m., Tuesday, February 12, 1946.)

[Endorsed]: Filed February 18, 1946. [1382]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

\* \* \* \* \*

Los Angeles, California, Tuesday, February 12, 1946.  
3:15 p. m.

(The following proceedings were had outside the presence and hearing of the jury:)

The Court: The record will show the appearance of counsel, that the jury is not present, and that this session was called by the court for the purpose of informing counsel as to the attitude of the court on the requested instructions by both sides in the case.

(Discussion between court and counsel on proposed instructions to the jury.)

Mr. Warne: Now, may we inquire, your Honor, in the event any exception is desired to be taken as to any instruction, the manner in which the court prefers that that be done?

The Court: It is immaterial to me. If you want to take them in the presence of the jury, you may do so immediately after the instructions are given. You can agree among yourselves as to that, and the record will be made up accordingly, so long as you both agree. Unless you both agree the Court of Appeals may look at it with technical nicety and insist that you should have taken the exceptions before the jury retired. I have called you here to discuss just what we are going to give in the instructions and what we are not going to give.

Mr. Warne: I do not anticipate anything at this time. [1384] My only thought was as to the method to be followed. My understanding of the rule is that the exception is to be taken out of the presence of the jury.

The Court: Let me see that rule again.

Mr. Warne: It is 51, I believe, under the new rules.

The Court: They used to do it before the jury.

Mr. Warne: Yes, I understand that.

The Court: It is better to take them out of the presence of the jury. So far as I am concerned, it has never irritated me, but I know it has been the source of irritation in certain instances.

Mr. Warne: I think in criminal cases you must take them in the presence of the jury.

The Court: "Rule 51. \* \* \* At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection [1385] out of the hearing of the jury."

So far as I am concerned, each side may except to the failure of the court to give any instruction that was requested by either side, or to the modification of any instruction that was requested and given to the jury, or you may do it in any other way you want to in order to preserve your record. You may preserve it in any way you may desire.

Mr. Warne: I will have to ask counsel here as to the methods that have been suggested.

Mr. Doherty: That last suggestion, it seems to me, is the simplest method; without going into detail to take a general exception to all of the instructions of the plaintiff or the defendant, as the case may be, that the court failed to give, and to take exceptions as to those that were given for the defendants or for the plaintiffs that were modified by the court, to the extent that they were modified.

The Court: That is what I tried to say, but the Major stated it more succinctly. Is that satisfactory?

Mr. Warne: And exceptions to all requested instructions as to which objections have been interposed, as given for the plaintiffs.

The Court: What do you say?

Mr. Karp: That is perfectly satisfactory, your Honor.

The Court: It is to the court, also.

Mr. Collins: One further matter, if the court please.  
[1386]

The Court: Also, Mr. Frankengerger, the clerk, wants to know about the form of verdict. Naturally, that is of concern to him. He has here submitted certain forms. Will you see if they are satisfactory, and if they are not, you had better agree upon the respective forms of verdict.

Mr. Karp: We have had copies of these submitted to us.

The Court: I think you can probably agree upon that without me.

Mr. Collins: One other thing, your Honor: The court said it would probably rule today upon the motion to strike.

The Court: I am going to deny it because I have covered it by an instruction. The motion to strike will be denied.

You ought to be able to agree, gentlemen, on the forms of verdict without my presence.

(Whereupon, at 4:40 o'clock p. m., February 12, 1946, an adjournment was taken until February 13, 1946, at 10:00 o'clock a. m.) [1387]

Los Angeles, California, Wednesday, February 13, 1946. 10 a. m.

(Thereupon the following proceedings were had outside the hearing and presence of the jury:)

The Court: Call the Finley case.

The Clerk: No. 4328-Civil, Larry Finley and Miriam Finley v. Music Corporation of America, et al.

Mr. Christensen: The plaintiff is ready.

The Court: The record shows that the jury is without hearing at this time.

Gentlemen, apparently there has been some misunderstanding by Mr. Harkness as to the hour of reconvening today. I can understand that from past experiences with people who get accustomed to certain hours in court and if there is any deviation it results in situations such as is presented now.

Mr. Harkness stated that he understood that the court would reconvene today at 1:30. As I say, I can understand how possibly he may have gotten that impression, because of the request of counsel that, instead of reconvening at 2:00 o'clock this afternoon, we reconvene at 1:30. Although apparently all of the other jurors understood it otherwise, I can understand how possibly he may have been misled. We just reached him on the



telephone at his place of business, and he stated he could be here in half an hour. I believe he is a little bit optimistic, taking into consideration [1389] where his place of business is, but I thought I would consult with you to see whether or not it is your thought that it would be best to convene at about 11:00 o'clock or a little after, or whether it would be better to convene at 1:30.

It looks now as though, on account of the length of the arguments and the instructions, the case probably will go into late afternoon. Now, as you know, the housing conditions and the culinary conditions are such that the jury's deliberations might be prolonged into the night hours, which I think would not be advisable if it can be avoided.

Mr. Doherty: I am going to reduce my argument, your Honor, if that will help the situation so far as time is concerned.

The Court: I don't think I should ask either of you to do that. It would be gracious on the part of both of you to do it, but I am not suggesting it on the part of either one. Of course, there is no jury to be prejudiced by these statements here.

Mr. Christensen: I have already indicated, your Honor, we would make it as short as we felt we could, and in no event over an hour and a half. I am optimistic now and hope that it will be much less.

The Court: What I want to know now specifically from each of you is whether you think it advisable to have the remainder of the jury wait until 11:00 o'clock, and who are [1390] now in the jury room and not in the court room, or whether it would be best to send them on their respective ways, with directions to be here at 1:30.

Mr. Christensen: The latter appeals to me.

Mr. Doherty: I had this in mind: if you have them in at 1:30 and you have two hours and a half of argument, and fifteen minutes of recess, that would take it up to a quarter to four.

The Court: And that would make it too late to have it go to the jury today.

Mr. Doherty: Then your Honor would instruct tomorrow?

The Court: That is right.

Mr. Doherty: That would be one procedure. The other is if counsel opens, say, at 11:00 o'clock or 11:15 and finishes at 12:00, and then say we reconvene at 1:00 o'clock, because all they have to do is to go out to lunch, and if that would not interfere with the plan, then I would close, say, by 2:00 o'clock and the jury would be ready to be instructed shortly after 3:00.

The Court: I am not going to state or to commit the court as to the time when the case will be submitted to the jury, because there are no facilities these days for night sessions; particularly in private litigation where the expenses have to be defrayed by the litigant. There is no way of housing jurors in the Federal Courts these days without [1391] imposing the costs on the litigants in a private suit, and in these times there are no facilities to take care of the jury in such situation. Of course, it may be that if the jury goes out in the daylight hours that it will not complete its duties and will prolong its deliberations into the night hours. That cannot be avoided. That is a matter that is brought about by the jury itself. But I do not feel that it should be submitted to them too late in the day, especially where we have mixed juries, as we do today. With men and women on

the jury, and where it necessitates a matron and a bailiff, I feel that all of those situations should be taken into consideration.

Mr. Christensen: May I make this further suggestion: Let us reconvene at 1:30 and complete our arguments, then if the court feels it is proper to give some instructions this afternoon, and not complete them, let us reconvene tomorrow at 9:30. Then the instructions won't take very long, the jury will have a fresh start and have the whole day in the daylight hours to consider the matter.

Mr. Doherty: I will leave it to your Honor's pleasure.

The Court: I think it would be better to wait until 11:00 o'clock. Then if Mr. Harkness is here at that time, we can proceed. If he is not here, we can recess until 1:00 o'clock, and he will be here at that time.

Call the jury, Mr. Bailiff. [1392]

(Thereupon, the following proceedings were had within the presence and hearing of the jury:)

The Court: The record shows that ten of the jurors are present in the jury box, and Juror Harkness is absent.

Ladies and gentlemen, we have communicated with Mr. Harkness. There has been a little misunderstanding by him as to the time of reconvening. I think he will be here at about 11:00 o'clock, so I am going to ask you to occupy the jury rooms until about that time, when you will be notified further in the matter.

We will take a recess until 11:00 o'clock.

(Thereupon a recess was taken until 11:05 o'clock a. m.)

The Court: The record will show the presence of all of the jurors. You made pretty good time, Mr. Harkness.

Juror Harkness: I wish to tender my apology to the court. It was a complete misunderstanding on my part. I understood the court was recessed until 1:30 this afternoon. I am very sorry I made that mistake.

The Court: Very well. We are glad to see you here at this time.

Juror Harkness: Thank you, your Honor.

The Court: Proceed with the arguments.

(Opening argument on behalf of the plaintiff by Mr. Jaffe.)

The Court: I think it is so close to the noon hour that [1393] we had better recess now until 1:30.

One-thirty this afternoon, ladies and gentlemen, please, and remember the admonition in the meantime and keep its terms inviolate.

(Whereupon, at 11:42 o'clock a. m., a recess was taken until 1:30 o'clock p. m. of the same day.) [1393-A]

Los Angeles, California, Wednesday, February 13, 1946. 1:30 p. m.

The Court: All present. Proceed, Major.

(Argument on behalf of the defendants by Mr. Doherty.)

(Closing argument on behalf of the plaintiffs by Mr. Christensen.)

The Court: Ladies and gentlemen, it is now twenty-five minutes of four, and this charge is quite lengthy.



I think perhaps we had better recess at this time until tomorrow morning.

During the recess, ladies and gentlemen, remember particularly the admonition not to talk about this case nor to suffer yourselves to be spoken to or approached by any person concerning the case or anything involved in the trial of this case. Do not form or express any opinions on the case until it is finally submitted to you.

If you will be here in the morning at 10:00 o'clock, ladies and gentlemen,—10 o'clock, please, tomorrow morning—you may not retire. Remember the admonition.

(Whereupon, at 3:40 o'clock p. m., Wednesday, February 13, 1946, an adjournment was taken until 10:00 o'clock a. m., Thursday, February 14, 1946.) [1394]

Los Angeles, California, Thursday, February 14, 1946.  
10 a. m.

The Court: All present, gentlemen. The record will so show.

Ladies and gentlemen of the jury: Preliminary to the instructions I want to express the Court's gratitude for the patient manner in which you have apparently approached your duties. It is satisfying to observe the co-operative attitude and the patience that juries manifest and that you have manifested throughout this case, which has been prolonged to some extent. When citizens are taken away from their respective activities, and required to attend at sessions that are protracted, when they do so with the patience that apparently you have, and with attentiveness and the conscientious application to duty, they are entitled to the gratitude of the courts, and for that reason I congratulate you and express our gratitude.



You are instructed as follows:

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others. [1396]

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his or her opinion on the case or to announce a determination to stand for a certain verdict. Remember that you are not partisans or advocates in this matter, but are judges.

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However,

you should not be influenced to vote in any way on any question submitted [1397] to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

When this case is submitted to you for decision, you are expected and required to determine the various questions and issues presented solely on the basis of the evidence introduced during the trial and the law as given to you in these instructions.

You must weight and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means [1398] that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in these instructions, and in accordance with the law as it is stated in the instructions.

There are two kinds of indirect or circumstantial evidence, namely, inferences and presumptions.

An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

A presumption is a deduction which the law expressly directs to be made from particular facts.

An inference must be founded: on a fact legally proved, or on such deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, [1399] the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

If you find that the facts proven in this case give equal support to each of two inconsistent inferences, then as a matter of law neither inference has been established, and your verdict must be against the person upon whom rests the necessity of sustaining one of those inferences as against the other, before he is entitled to a judgment.

The mere fact that this lawsuit was commenced by Larry Finley is no evidence or proof that the defendants, or any of them, have engaged in a combination, conspiracy

or agreement in violation of the Federal anti-trust laws, as charged in the complaint. Therefore, you shall not consider the complaint or the amended complaint, or any allegation in either, as proof of any fact adverse to the defendants unless, of course, an allegation has been admitted in defendants' answer. In this connection, you are informed that in their answer the defendants have not admitted but have denied all allegations of wrong doing on their part.

Various documents, called exhibits, have been introduced in evidence and their contents have been read to the jury. Among these documents have been the following:

Plaintiff's Exhibit No. 6, a bid submitted to the City Council of San Diego by Wayne Dailard, respecting [1400] the Mission Beach Amusement Center.

Plaintiff's Exhibit No. 8, a bid submitted to the City Council of San Diego by Larry Finley, respecting the Mission Beach Amusement Center.

Plaintiff's Exhibit No. 7, three newspaper advertisements published in the San Diego Tribune Sun on May 14, 15 and 16, 1945, respectively, relating to the Pacific Square Ballroom.

Defendants' Exhibits Nos. G and H, two newspaper advertisements published in San Diego newspapers on May 11, 1945, and relating to the Mission Beach Ballroom.

These instruments were admitted not as proof of the truth of their contents, but only as proof that such documents were actually prepared and filed or published, and became material to the case. Their value, weight and effect is for you to determine. Before the jury consider such documents as binding upon the defendants in this case or for the purpose of determining their liability, if



the defendant resides or is found, and shall recover three-fold the damages by him sustained and the costs of suit, including reasonable attorneys' fees.

Plaintiff in an anti-trust suit need not himself be in interstate commerce, and it is sufficient that the combination, if any, which is the cause of his injury, if any, seeks to restrain such interstate commerce.

The term "preponderance of the evidence," as used herein, means such evidence as has, when weighed with that opposed to it, more convincing force, and from which it results that the greater probability of truth lies therein.

In order for plaintiffs to recover a judgment in this case against one or more of the defendants, the law requires that plaintiffs prove, by a preponderance of the evidence, each and all of the following facts:

1. The existence between the months of November, 1944, and March, 1945, of an agreement, combination or conspiracy between one or more of the defendants and Wayne Dailard, to unreasonably restrain interstate commerce in so-called "name" [1404] bands, as alleged in the complaint and the amended complaint, and to the injury of plaintiff.

2. The actual restraint of interstate commerce in so-called "name" bands as a result of such agreement, combination or conspiracy.

3. Injury to plaintiffs which resulted directly from acts committed by one or more of the defendants pursuant to such agreement, combination or conspiracy; and

4. Injury to plaintiffs of a kind and extent which can be measured in money, and is not determined merely by conjecture, speculation or guesswork.



You may not presume that the defendants, or any of them, are liable to the plaintiffs in this action merely because the plaintiffs have filed a complaint, or an amended complaint, charging that the defendants have engaged in a combination and conspiracy to restrain interstate commerce in so-called "name" bands. The defendants, and each of them, are presumed to have conducted themselves and their business in a lawful manner until the plaintiffs prove to the contrary by a preponderance of the evidence.

Evidence has been presented to show that Music Corporation of America is one of the so-called "big four" booking agencies or personal service organizations which today represents band leaders throughout the country. You are instructed that such evidence, standing alone and in and of [1405] itself, is not proof of any violation of the Federal anti-trust laws.

During the course of the trial, frequent reference has been made to the American Federation of Musicians, which has been referred to as a labor organization and as the "Musicians Union". The American Federation of Musicians is not a defendant and is not on trial and its policies and practices are not issues in this case. Therefore, you shall not permit any sympathy or prejudice toward American Federation of Musicians to influence your consideration or decision of this case.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an

express or formal agreement for the unlawful venture or scheme with which such persons are charged, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common [1406] and unlawful design with which they are charged. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, if any there is, every one of said persons becomes a member of the conspiracy.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to

the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved. [1407]

Mere knowledge alone does not make one a member of a conspiracy, either knowledge of the existence of the conspiracy or knowledge of the commission of overt acts or even participation in an overt act, but there must be membership in the unlawful combination by aid, assistance or tacit understanding.

Certain testimony has been admitted concerning alleged activities and statements of Wayne Dailard, whom plaintiffs allege to be a co-conspirator, but who is not named as a defendant in the suit. Evidence of these alleged activities and statements, in and of themselves, are not to be considered by you as evidence establishing the conspiracy alleged in the complaint or amended complaint, but such alleged conspiracy must be established, if at all, by other evidence, and must be found by you from such other evidence to have existed at the time of such alleged activities and statements before you would be authorized under the law to consider them in connection with the other evidence.

During the course of the trial the court dismissed this action as to Jules C. Stein personally. The fact that Jules C. Stein is no longer a defendant in this action is not a fact from which you may draw any inference as to the liability of the defendants who remain on trial. You are not permitted to infer from this fact that the defendants who are still in the case are liable to the plaintiffs. [1408]

The defendant, Music Corporation of America, is a corporation and as such can act only through its officers

and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is. It has been established that the defendant, Eames Bishop, is and was an agent of the defendant, Music Corporation of America, and that the defendant, Lawrence Barnett, is and was an agent and officer of the defendant, Music Corporation of America, and that their acts and actions in conjunction with transactions involving Pacific Square Ballroom and Mission Beach Ballroom at San Diego, California, were performed by them while acting within the scope of their authority as such agents. Thus, their conduct, and the conduct of each of them, shall be deemed by you to be the conduct of the corporation, Music Corporation of America.

Before you may return a verdict against any defendant you must find that he was a party to a combination, agreement or conspiracy to restrain interstate commerce in so-called "name" bands, and you must further find that Wayne Dailard was a party to such combination, agreement or conspiracy. Depending upon your findings, you may return a verdict against one or more defendants, and in favor of other defendants. In other words, you may return a separate verdict [1409] as to any defendant.

The plaintiffs charge that defendant, Music Corporation, has with Wayne Dailard conspired to monopolize trade and commerce in so-called "name" bands. In the eyes of the law and for purposes of applying the Federal anti-trust laws, the expression "to monopolize trade and commerce" means "to control it, to exclude others from trade in commodities in such commerce and prevent them from dealing therein in a free market."



A combination which unreasonably limits competition, which would otherwise exist between persons in similar businesses, is illegal.

The defendant, Music Corporation of America, had a legal right to deal exclusively or preferentially with Wayne Dailard, so long as it did not do so for the purpose of unreasonably restraining or monopolizing interstate commerce in so-called "name" bands pursuant to a combination or conspiracy.

The rule that a trader engaged in entirely private business may freely exercise his own independent discretion as to parties with whom he will deal, is subject to condition that a particular method of doing business must not run afoul of the anti-trust laws of the United States.

The written agreements between Music Corporation of America and Wayne Dailard, which have been introduced in [1410] evidence in this case as Defendants' Exhibits, numbers E and F, in and of themselves are lawful agreements which the parties had the right to make and to perform.

If you find that the written agreements in evidence between Music Corporation of America and Wayne C. Dailard represent the entire understanding between the defendants, or any of them, and said Wayne Dailard, respecting the matter of providing bands and musical entertainment at San Diego; and if you further find that there was no other contract or agreement and no combination or conspiracy between the defendants, or any of them, and said Wayne Dailard, as charged in Plaintiffs' complaint and in plaintiffs' amended complaint, then you cannot find for plaintiffs, unless you find from a



preponderance of the evidence that the defendants and said Wayne Dailard made and performed said agreements with the intent and for the purpose of restraining or monopolizing interstate commerce in so-called "name" bands.

The primary object of award of damages in a civil action—this is a civil action—is just compensation, indemnity or reparation for pecuniary loss, if any, that results to plaintiffs directly or proximately from unlawful conduct on the part of defendants, if any.

In a suit under anti-trust laws for claimed loss of profits if fact of damages is proved, the amount may be reasonably approximated where based upon competent evidence. [1411]

Evidence has been presented in this case which indicates that the plaintiffs have set up and maintained a set of bookkeeping records covering their operation of the Mission Beach Amusement Center, and that these records list the ballroom income and expenditures separately from the income and expenditures relating to the concessions and other operations of the Amusement Center. In the event you should find it necessary to decide any issue which requires you to consider these bookkeeping records, you are instructed that you are not bound by the bookkeeping methods used by plaintiffs and you are not required to treat ballroom income and expenses separate or apart from other income and expenses of the Amusement Center as a whole. It is a question of fact solely for you to determine whether the ballroom and the various concessions were operated by the plaintiffs as one enterprise, and whether the expenses shown on the records were necessary, proper, reasonable, and actually incurred.

In the event you find it necessary to consider the issue of damages, you are instructed that in an action of this character under the anti-trust laws, the recoverable damages, if any there be, are only those sustained by the plaintiffs from the time the cause of action accrued up to the time suit was brought. Damages, if any, which accrued after the suit was brought are not recoverable in the action unless they are shown to be the result of acts done before the suit [1412] was commenced. There is no claim by plaintiffs that any cause of action accrued prior to the date on which they commenced to operate the Mission Beach Amusement Center and Ballroom, which was February 3, 1945, and the records of this Court show that their suit was commenced on March 20, 1945.

In an action for damages as a result of a conspiracy by defendants in violation of anti-trust laws, verdict for plaintiffs, if the jury so finds from the preponderance of the evidence, should be for the actual damages sustained, if any, and the amount of actual damages, if any, must then be trebled so that two-thirds of damages will be the penalty.

In determining the liability, if any, or the amount of damages, if any, of the defendants, or any of them, to the plaintiffs, you shall not give any consideration whatever to any evidence which has been introduced in this case relating to the financial worth or wealth of Wayne Dailard. You are instructed that Wayne Dailard is not a defendant in this action and you cannot award any judgment against him, and his financial worth or wealth has no relationship to the liability, if any, of the defendants, or any of them, and cannot be considered in

determining the amount, if any, of the judgment to be awarded in this case.

In considering the question of damages or the amount of liability, if any, of the defendants to the plaintiffs, you shall not permit yourselves to be influenced by and you shall [1413] give no consideration whatever to evidence relating to the financial position or worth of Music Corporation of America or any of its officers or employees, including the individual defendants in the court. In the event, but only in the event, you should first determine that the defendants have conspired or combined to restrain or monopolize interstate commerce in so-called "name" bands shall you consider the question of damages. Thereafter shall you consider the matter of damages, and in so doing you shall award damages only if you find that plaintiffs have suffered loss of profits in the operation of the Mission Beach Amusement Center as a direct result of a combination or conspiracy or unlawful agreement among the defendants and Wayne Dailard, the purpose of which was to unreasonably restrain or monopolize interstate commerce in so-called "name" bands, and in that event you shall consider only such losses of profits, if any, as have been shown by a preponderance of the evidence in the case to be directly and proximately attributable to said conduct of the defendants and in a definite, ascertainable amount.

Evidence has been introduced for the purpose of showing that during the operation of the Mission Beach Amusement Center by Wayne Dailard drunkenness, immorality and unsanitary conditions were permitted to exist and that the City Council of San Diego declined to renew his lease because of these conditions. [1414]

Even if you find this to be a fact, you are instructed that no evidence has been introduced to show that the defendants, or any of them, acting in concert, combination or conspiracy with Wayne Dailard were responsible for any of said conditions. Therefore, in deciding the question whether the defendants have engaged in an unlawful combination, agreement or conspiracy you shall disregard entirely and completely the evidence which has been introduced concerning unsatisfactory conditions at the Mission Beach Amusement Center during the time it was operated by Wayne Dailard. Such evidence is to be considered solely on the question of damages, and then only if and when you find from a preponderance of the evidence that defendants, or one of them, is proven to have violated the anti-trust laws of the United States, as I have stated such laws in these instructions.

The fact that I have or may instruct you upon the rules governing the measure of damages is not in any wise to be taken as an indication upon my part that I believe, or do not believe, that the plaintiffs are, or are not, entitled to recover damages, for you are the sole judges of the facts. Such instructions are given you solely to guide you in arriving at the amount of your verdict in case you find from a preponderance of the evidence that the plaintiffs are entitled to recover. If from the evidence and instructions I give you, you should find that the plaintiffs should not [1415] recover, then you are to disregard entirely the instructions which I give you governing the measure of damages.

When you retire to the jury room, ladies and gentlemen, you will choose one of your number to act as foreman, and will then proceed to deliberate carefully,



cautiously, dispassionately and impartially upon all of the evidence, apply the law which the court has given you in these instructions and throughout the case in its instructions to you.

When you shall reach unanimous agreement, that is to say, when each and every one of you shall agree upon a verdict, you will have that verdict reduced on one or the other of the blank forms which the clerk has prepared for your convenience only; have it filled out in accordance with your unanimous findings at the appropriate places and spaces by the person whom you choose as foreman, have it dated in the appropriate place, and return into court with the signed verdict. [1416]

Are there any exceptions, gentlemen?

Mr. Collins: Yes, your Honor.

Mr. Warne: Will counsel approach the bench?

(Thereupon the following proceedings were had outside the hearing of the jury:)

Mr. Collins: I believe we have an understanding effected at Wednesday's session that there is a standing exception deemed taken by either party to instructions requested and not given. I merely want the record to show that at this time.

Mr. Christensen: That is perfectly agreeable.

The Court: It is so understood.

Mr. Warne: Further, that we have excepted to any instructions as requested by the plaintiff, and to which we have heretofore noted an objection.

The Court: It is so understood.

Mr. Christensen: And that we have excepted to instructions given at the request of the defendants.

Mr. Warne: Very well.



The Court: Did you file written objections to their requested instructions?

Mr. Christensen: No, your Honor.

The Court: The record will show that while plaintiffs have not filed any written objections to requested instructions on behalf of the defendants, as given by the court, [1417] they may have an exception to such instructions.

Mr. Warne: I think it might be well that something be said to the jury so as not to give the impression that the exceptions are taken to the entire charge as made, but that we were confirming a stipulation which was heretofore entered into in the case as to the instructions.

The Court: Is there any objection to that?

Mr. Christensen: I don't see any purpose to be served by it.

Mr. Warne: I am thinking solely of the effect on the jury, of course.

The Court: I don't think they ought to know anything about it. I have told them what the law is; that is, what the law in the case is.

Mr. Warne: Very well.

(Thereupon the proceedings were resumed within the hearing of the jury:)

The Court: Swear the officers to take charge of the jury.

(Thereupon the officers were duly sworn.)

The Court: Go with the officers, please, ladies and gentlemen, and if you want any of these exhibits, you may ask for them and we will send them up.

You have examined these proposed forms for the verdict, have you, gentlemen? [1418]

Mr. Warne: Yes, they have been examined.

Mr. Christensen: Yes.

The Court: And they are satisfactory to both sides?

Mr. Christensen: Yes, your Honor.

Mr. Warne: Yes, your Honor.

(Thereupon the jury retired to deliberate and the following proceedings were had outside the presence and hearing of the jury:)

The Court: The record will show that the jury is out of hearing.

I want to call your attention, gentlemen, to the proposed form in which the finding is in favor of plaintiffs and against all defendants. Of course, I suppose that the jury understands its duty is that they could strike out and insert. What I have in mind is this: that each defendant, according to the instructions and according to the law, is entitled to separate consideration by the jury. The way these forms of verdict read, they must either find against all of the defendants or must find in favor of all of the defendants, which I don't believe is the correct situation. For instance, there are two personal defendants in this case in addition to the corporate defendant, namely, the defendant Bishop, the defendant Barnett, and the defendant Music Corporation of America. Now, supposing the jury wanted to make a finding in which they would use that form but they felt that [1419] one or the other or two of the defendants should be held liable and the other exonerated. I think they should be able to do it. If, however, you are satisfied with these forms of verdict and you are not going to take any exception to them, regardless of which one is used and regardless of the phraseology, I will submit

them to the jury. But I don't know if you have given that any thought.

Mr. Warne: We have no objection to them.

Mr. Christensen: I have no objection.

The Court: Very well. Give those to the foreman of the jury.

Now, gentlemen, if you leave you should leave your telephone numbers with the clerk. I think you should remain around now for a while, at least. [1420]

Los Angeles, California, Thursday, February 14, 1946.  
3:44 p. m.

The Court: The record shows the jury is here at its own request.

That is correct, is it, Mr. Hudson,—Mr. Foreman?

The Foreman: Yes, sir.

The Court: What is the situation?

The Foreman: We have two or three questions which we would like to have reviewed. The first thing we would like to have is a review of the instructions pertaining to conspiracy in this case, the instructions you gave, as we find that we don't quite remember them.

The second thing we have in mind is that we would like to have information on the period to be considered in which damages, if any, may have occurred; whether it is to be considered just between January 3rd, or whatever it was, and February 20th, or what other period. Also, whether the ballroom operations only should be considered.

In addition to that, there are certain matters contained in the transcript of testimony, and we wonder if we may have the transcript of the testimony.

The Court: It is not customary to give to the jury the transcript of the testimony, but if there are any portions of the evidence which you desire to have read, you may ask for it. [1421]

The Foreman: Well, there is. If I may say, particularly we would like to have the testimony of—let me see—the testimony of Mr. Barnett, I believe it is, pertaining to the Tommy Dorsey engagement at Mission Beach. That is the particular testimony that we want.

In addition to that, when we retire to the jury room, I think we should have, possibly not all of the exhibits, but—well, I am not sure which—

The Court: We will let you have all of them.

The Foreman: Will you do that?

The Court: Yes. Then you can find those that you want. There will be no objection to that, I do not suppose.

Now, I think perhaps we had better get that testimony first, and then I will read the portions of the charge that are applicable.

Can you agree upon it, gentlemen? You have the transcript, or I have the court's copy of the transcript here. It can be found readily, I assume, the testimony of Mr. Barnett on the Tommy Dorsey engagement at Mission Beach.

Mr. Christensen: If the court please, my copy of the transcript is not here. Perhaps we could assist by looking at it with counsel while your Honor is discussing some other phase of the case.

The Court: While counsel are looking for those portions of the evidence, gentlemen,— [1422]

Mr. Warne: Your Honor, may we discuss among ourselves some further questions, if any?

The Court: Yes, but I would prefer that you do it in a low voice.

Mr. Warne: Yes, sir.

The Court: We will wait until counsel have agreed on the portions of the evidence referred to.

The Foreman: If your Honor please?

The Court: Yes, Mr. Foreman.

The Foreman: The particular testimony that we are anxious to get is that in which some testimony was given regarding a conversation with one Michaud, I think the name is, and we are not real positive that it was Mr. Barnett. It might have been Mr. Bishop, but I think it was Mr. Barnett.

Mr. Christensen: I haven't had a chance to review that.

The Court: I am not going to read anything unless you are agreed that what you hand to the court is all of the matter that the jury requests. That is the reason I have submitted the court's copy of the transcript to counsel for both sides. I understood Mr. Christensen to make the observation that he has not seen what the court has.

Gentlemen, it now appears, from the foreman's statements, that it is a specific portion of the testimony of either Mr. Barnett or Mr. Bishop that is the matter with which the jury is concerned. Am I correct, Mr. Foreman? [1423]

The Foreman: Yes.

The Court: Look through the transcript and get that portion. He states it is in the testimony of either one, or it may be in both. My own memory is not sufficiently



positive on it to state, but the record is here and there need be no question about it at all.

Mr. Doherty: There was some testimony, your Honor, of a conversation between Mr. Bishop and Mr. Michaud, and there was also some testimony respecting Mr. Barnett at a hotel in New York, about the Tommy Dorsey matter. That is the part that has been given to your Honor.

The Foreman: It is that particular testimony of the conversation with Mr. Michaud or regarding Mr. Michaud with which we are concerned. Whether it is Mr. Bishop or Mr. Barnett, we are not sure.

The Court: Is it understood that the portion referred to and interrogated about by the jury is in this transcript which has been handed to the court, from page 1077 to page 1246, inclusive?

Mr. Jaffe: If the court please, I believe Mr. Bishop also testified about it.

Mr. Warne: May I say this with reference to what was handed to the court? The matter we examined there refers to conversations, or, rather, to interrogation of Mr. Barnett relative to conversations with Mr. Dorsey or Mr. Michaud. Am [1424] I correct, Mr. Jaffe?

Mr. Jaffe: Yes.

Mr. Warne: Now, I have not looked at the testimony of Mr. Bishop as yet.

Mr. Christensen: There is separate testimony of Mr. Bishop.

Mr. Warne: Yes, there is such testimony.

The Court: When you get that, it will not be necessary for any one to mention what it is, and let's have no argument between you, gentlemen.

Mr. Warne: I am sorry.

Mr. Christensen: Your Honor, may I inquire: Do they desire the testimony of Mr. Barnett also, with the band leader, Charlie Barnett, or not?

The Court: I will ask Mr. Hudson if that is the case. He hasn't said it is. I am not suggesting that the jury want anything or do not want anything. Counsel has asked a question, and I assume that the foreman has stated precisely and extensively and accurately everything that the jury desires.

The Foreman: I think that is everything we require, that testimony of Mr. Barnett concerning Mr. Michaud and concerning the Tommy Dorsey engagement.

The Court: If there be any testimony of Mr. Bishop on the point, is it desired that that also be read? [1425]

The Foreman: If we may have it. When we hear this testimony, it may be sufficient, and we may not have to have the rest of it.

The Court: Do you have anything there?

Mr. Warne: Yes, we have it.

The Court: If you have it, we will read it.

Now, you must have your conversations quietly, gentlemen, or I am not going to permit you to have any at all.

I will read first, ladies and gentlemen, from the reporter's transcript of proceedings, which appears to be in the direct examination of the witness

## LAWRENCE BARNETT,

commencing on line 4 of page 1158:

"Q. By the way, one other question I didn't go into, and should have. Did you ever have any discussion with Mr. Michaud, who has been described here as Tommy Dorsey's personal manager or manager of his orchestra, relative to his playing at Mission Beach?

"A. Yes.

"Q. Where?

"A. At the opening at the Plaza Hotel in New York City.

"Q. Who was present?

"A. Mr. Bishop, Mr. Michaud and myself.

"Q. Relate the discussion, please."

There was an objection to that, which was sustained by [1426] the court.

"Q. By Mr. Warne: Did you ever have any conversation with any other band leader who is represented by Music Corporation of America, relative to his, that is, that band leader's playing in Mission Beach?

"A. Yes.

"Q. With whom?

"A. Charles Barnet.

"Q. Did Charles Barnet play at Mission Beach?

"A. Yes.

"Q. Where did that conversation occur?

"A. The conversation took place in New York City.

"Q. Will you relate it, please?"

To which an objection was made by counsel for plaintiffs, and the objection was sustained.

(Testimony of Lawrence Barnett)

"Q. By Mr. Warne: Subsequent to that conversation did Mr. Barnet play Mission Beach?

"A. Yes.

"Q. Did you at any time ever state to Mr. Barnet that he should not play Mission Beach?

"A. No.

"Q. Did you ever at any time say to Mr. Michaud that Tommy Dorsey should not play at Mission Beach?

"A. No. [1427]

"Mr. Warne: Cross-examine."

The next matter on that phase of it appears to be on page 1184 of the reporter's transcript. I had better go back a little to connect it up, to a little earlier in the transcript, on page 1183, commencing with line 12.

"Q. You offered Charlie Barnet to play at the Casino Room?

"A. At the Casino Gardens, yes.

"Q. And Mr. Finley wanted him also for the Mission Beach Ballroom?

"A. Mr. Finley never talked to me about Charlie Barnet for the Mission Beach Ballroom.

"Q. You know that Charlie Barnet did play at the Mission Beach Ballroom?

"A. Yes.

"Q. Did you have anything to do with that booking?

"A. Yes.

"Q. Did you make the contracts out?

"A. No, but Mr. Barnet talked to me about it in New York City.

"Q. You didn't have anything to do personally with the contracts?

"A. No, I believe Mr. Bishop submitted the contracts.

(Testimony of Lawrence Barnett)

"Q. Did you have any part in the preparation of [1428] the contracts for the Tommy Dorsey booking, Mr. Barnet?

"A. No, Mr. Bishop prepared them.

"Q. You talked to Tommy Dorsey. though, while he was in Boston, shortly before he came out to play that engagement, didn't you?

"A. I did not.

"Q. I mean, by telephone?

"A. No.

"Q. Did you talk to him at all while he was in the East concerning that booking?

"A. No.

Mr. Christensen: Thank you very much, Mr. Barnett." That seems to be all that counsel have indicated.

Mr. Warne: Your Honor, I think there is something additional I inquired into, as I recall, on redirect.

The Court: On page 1187, which seems to be the redirect examination by Mr. Warne, commencing with line 15.

"Q. Did you have any conversation with any band leader who is represented by your company relative to the respective merits of Pacific Square and Mission Beach as ballrooms in San Diego?

"A. One.

"Q. Who?

"A. Charlie Barnet. [1429]

"Q. Was that the conversation in New York, that you refer to? "A. yes.

"Q. That is the one you referred to in the cross examination of Mr. Christensen also?

"A. Yes.



(Deposition of Lawrence Barnett)

"Q. Will you relate it, please?"

There was an objection to that, and I think I will read the record:

"Mr. Christensen: To which we object as calling for hearsay.

"The Court: You did open the door a little on it, I believe.

"Mr. Christensen: I didn't ask for any conversation.

"The Court: I know, but you opened the door. I will permit him to answer.

"The Witness: A. I was in New York City and Mr. Charlie Barnet called me at our New York office, and told me Larry Finley was in town and taking him around, showing him the sights, and that he liked Finley very much, he was a very nice fellow, and would like to play for him in San Diego at Mission Beach and he wanted to know if we had any objection.

"I said, 'No, if you want to play down there, [1430] it is all right.' I said, 'You have played for Pacific Square in the past. I think if you go to Mission Beach you might be making a mistake because you might be antagonizing the owner of Pacific Square.'

"Mr. Barnet said he didn't care, he would like to play for Larry Finley because he was a nice fellow. I said, 'O.K.'

"Mr. Warne: No further questions.

"Recross Examination.

"By Mr. Christensen:

"Q. So he insisted on it anyhow, even though you advised against it?

"A. I didn't advise against it.

(Testimony of Lawrence Barnett)

“Q. You told him he was making a mistake, didn’t you?”

“A. Well, that isn’t advising against it.

“Q. Hadn’t Charlie Barnet played at Mission Beach before?”

“A. I don’t know. I don’t think so during the time Larry Finley had it. If he played there when Dailard had it, I would have to look up the records before I could tell you.

“Q. You did not look up the records before you told him he was making a mistake in playing at Mission [1431] Beach, did you?”

“A. No.

“Q. You were afraid he would make Dailard mad, weren’t you?”

“A. Wait a minute. Dailard didn’t have Pacific Square at that time, so I wasn’t afraid he would make Dailard mad.

“Q. No, you thought he would make Finley mad if he played at Pacific Square?”

“A. No, Dailard didn’t have anything to do with Pacific Square when Barnet played at Mission Beach.

“Q. He didn’t?”

“A. No.

“Q. When did he play at Mission Beach?”

“A. He played over Christmas and New Year’s, and the first week of January.

“Q. And Finley had the Mission Beach Ballroom at that time?”

“A. That’s right.

“Q. And Dailard—or, Stutz had Pacific Square?”

“A. That is correct. Now you are right.”

That is the end of that. That seems to be all of the testimony from Mr. Barnett upon that point.

Now, counsel have suggested a portion of the testimony of Mr. Bishop on the point. [1432]

This mark indicates it, does it, gentlemen?

Mr. Jaffee: Yes, your Honor.

The Court: This, apparently, is on cross examination of Harold Eames Bishop, on page 1068 of the reporter's transcript:

"Q. You recall the booking there of Tommy Dorsey into the Mission Beach ballroom, don't you?

"A. Yes.

"Q. You know about that, don't you?

"A. Yes.

"Q. You first learned about it when Tommy Dorsey's manager, Mr. Michaud, called and told you to issue the contracts?

"A. I don't recall whether that is the first knowledge that I had that the booking was being contemplated, no.

"Q. What is your best memory as to your first knowledge of that matter, Mr. Bishop?

"A. Well, I had heard discussion prior to the time that I was advised to issue the contracts that Tommy Dorsey was considering going to Mission Beach.

"Q. And you talked to Mr. Michaud?

"A. That is right.

"Q. He at that time was in New York?

"A. That is correct.

"Q. And you requested him not to book the date [1433] at Mission Beach, didn't you?

"A. I did not.

(Testimony of Lawrence Barnett)

"Q. Did you tell him that he should not play down there?

"A. I told Mr. Michaud that Pacific Square had presented Tommy Dorsey's orchestra many times in the past; that his orchestra had always enjoyed a very exceptionally fine business at Pacific Square. I told him that, in my opinion, my advice would be for him to continue appearing at Pacific Square for reasons: One, I thought his gross would be bigger; two, the Pacific Square was not a seasonal operation, and that there might be occasion when Mr. Dorsey would be available for booking in San Diego possibly in the winter-time when it was not advantageous and sound business to play at a beach resort; and I did not feel that he should incur the displeasure of Mr. Dailard by playing competition to him.

"Q. And Mr. Michaud told you that Mr. Tommy Dorsey wanted to play there, though, at the Mission Beach ballroom?

"A. Mr. Michaud at that conversation told me that he would discuss the matter with Tommy Dorsey and that he would advise me back.

"Q. You asked Mr. Michaud if it would be all [1434] right with him, Mr. Michaud, for you to call Tommy Dorsey directly at the place he was playing then, which I believe was Boston; that is correct, isn't it?

"A. I may or may not have made that statement. I don't know.

"Q. And you did telephone to Tommy Dorsey in Boston, didn't you?

"A. I did not telephone Tommy Dorsey.



(Testimony of Lawrence Barnett)

"Q. Well, you talked to him there?

"A. I did not talk to Mr. Dorsey.

"Q. Did you talk to Mr. Dorsey at all?

"A. I did not talk to Mr. Dorsey personally relative to the appearance in San Diego.

"Q. How many times did you talk to Mr. Michaud about it?

"A. To my knowledge, I talked to Mr. Michaud only on this one conversation, and I don't recall exactly whether I was advised by wire or by telephone call or through another member of our organization to issue the contracts. That may possibly be another time that I talked to Mr. Michaud.

"Q. Even though you had tried to discourage Mr. Michaud—Mr. Dorsey, through Mr. Michaud, from playing Mission Beach ballroom, he said he wanted to [1435] play Mission Beach ballroom, didn't he?

"A. The only information following the discussion which I have herewith stated to you was the information that the contract should be issued, and a statement of terms under which those contracts should be issued.

"Q. In other words, you were advised by Tommy Dorsey of that fact?

"A. By Arthur Michaud.

"Q. Now, that was a direct booking by Mr. Finley with Mr. Tommy Dorsey?

"A. The booking—the mention of the price was direct. The booking was executed by Music Corporation of America, in fact we secured the signature of the principal parties.



(Testimony of Lawrence Barnett)

“Q. You insisted on that, didn’t you?

“A. We insisted that the contract be on Music Corporation of America forms.

“Q. At that time you wanted it on M.C.A. forms; is that right?

“A. I don’t—your implication there—we always insist on our bands that they be on M.C.A. forms.”

Then the inquiry goes into another phase of the matter. That seems to be all that counsel have suggested on that, [1436] Mr. Hudson.

I will now read the portion of the charge that you have asked for. The first inquiry was for the instructions on the question of conspiracy. I shall reread those instructions:

“A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

“To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful venture or scheme with which such persons are charged, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design with which they are charged. In other words, when

an unlawful end is sought to be effected, and two or more persons, actuated by the [1437] common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, if any there is, every one of said persons becomes a member of the conspiracy.

“Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an [1438] inference from facts proved.

“Mere knowledge alone does not make one a member of a conspiracy, either knowledge of the existence of the conspiracy or knowledge of the commission of overt acts or even participation in an overt act, but there must be membership in the unlawful combination by aid, assistance or tacit understanding.

“Certain testimony has been admitted concerning alleged activities and statements of Wayne Dailard, whom plaintiffs allege to be a co-conspirator, but who is not named as a defendant in the suit. Evidence of these alleged activities and statements, in and of themselves, are not to be considered by you as evidence establishing the conspiracy alleged in the complaint or amended complaint, but such alleged conspiracy must be established, if at all, by other evidence, and must be found by you from such other evidence to have existed at the time of such alleged activities and statements before you would be authorized under the law to consider them in connection with the other evidence.”

Then there was the question as to the period of damages, if any, I believe:

“Evidence has been presented in this case which [1439] indicates that the plaintiffs have set up and maintained a set of bookkeeping records covering their operation of the Mission Beach Amusement Center, and that these records list the ballroom income and expenditures separately from the income and expenditures relating to the concessions and other operations of the Amusement Center. In the event that you should find it necessary to decide any issue which requires you to consider these bookkeeping records, you are instructed that you are not bound by the bookkeeping methods used by plaintiffs and you are not required to treat ballroom income and expenses separate or apart from other income and expenses of the Amusement Center as a whole. It is a question of fact solely for you to determine whether the ballroom and the various concessions were operated by the plaintiffs as one enterprise, and whether the expenses shown

on the records were necessary, proper, reasonable, and actually incurred.

“In the event you find it necessary to consider the issue of damages, you are instructed that in an action of this character under the anti-trust laws, the recoverable damages, if any there be, are only those sustained by the plaintiffs from the time the cause of action accrued up to the time suit was brought. [1440] Damages, if any, which accrued after the suit was brought are not recoverable in the action unless they are shown to be the result of acts done before the suit was commenced. There is no claim by plaintiffs that any cause of action accrued prior to the date on which they commenced to operate the Mission Beach Amusement Center and Ballroom, which was February 3, 1945, and the records of this Court show that their suit was commenced on March 20, 1945.”

The Court: Mr. Foreman, do you think that covers it, or do you think I should read the other instructions that were given on the subject of the measure of damages, if any?

The Foreman: If I may, I will sort of poll the jury.

The Court: Yes, sir.

The Foreman: It seems to us that will be sufficient, your Honor. Thank you very much.

The Court: Very well. Ladies and gentlemen, you may retire again, please, and we will send up the exhibits.

(Whereupon, at 4:28 o'clock p. m., the jury retired to continue its deliberations.) [1441]



Los Angeles, California, Thursday, February 14, 1946.  
11:45 p. m.

The Court: The record shows that all the jurors are here, having been brought into court at their request. I shall ask Mr. Hudson, the foreman, a few questions.

Mr. Hudson, you have addressed a note to the judge, as follows:

"We have not been able to arrive at a verdict and feel that further deliberation at this time is useless. A. W. Hudson, Foreman."

Is it a question of law, or a question of fact, Mr. Hudson, in your opinion, or is it both?

The Foreman: Well, it is more a question of fact, your Honor.

Do you want me to speak freely?

The Court: No, not just yet. I want to ask you a few questions.

The Foreman: A possible question of law. However, more a question of fact.

The Court: Of course, if it is a question of fact and there is a fixed division, why, there isn't anything that the court can do, because that is an exclusive function of the jury to determine questions of fact in a jury case. If it is a question of law, of course, it can always be clarified.

The Foreman: I might say that there is some question [1442] which probably is a question of law as regards the conspiracy angle. I might express it this way, that our deliberation has been along this line, that we had to arrive at a verdict, a unanimous verdict, as regards the conspiracy causing damage to Finley.

The Court: Yes, sir.



The Foreman: The mere fact of a conspiracy was not our problem. It was a conspiracy that caused damage to the complainant. That was the basis of our consideration.

The Court: I gather from that, then, that the jury might have overcome the question of liability, but when it came to the question of damages there was an impasse. Does that express it?

The Foreman: No, that is not correct. It isn't—you mean a question of the amount of damages?

The Court: Yes, sir.

The Foreman: No, that wasn't the thing that has stopped us.

The Court: It was a question, then, a factual question as to whether the evidence satisfied all of you that there had been a combination or conspiracy—

The Foreman: Yes, sir.

The Court: —in restraint of trade?

The Foreman: Which resulted in damage.

The Court: Do you think that there is any reasonable [1443] probability of an agreement in the case if the jury is permitted to deliberate longer?

The Foreman: Well, I had thought that this group of people should be able to arrive at a verdict, but in our present condition, anyway, why, I doubt if there is a chance for us to arrive at it.

The Court: There has been a full and free discussion on the part of every juror?

The Foreman: Constantly, from the time when we first went up there, except for the time when we went out for dinner, and I think, your Honor, there has been an honest desire on the part of all concerned to arrive

at a conclusion, and we have not been able to arrive at it.

The Court: I see. Thank you, Mr. Hudson.

I will go down the line and ask all of the jurors how they feel about it.

Mr. Harkness, how do you feel about the situation? Do you think there is a reasonable probability of an agreement if the jury is permitted to deliberate further, or if there is anything the court can clarify? Of course, I will not instruct you on the facts, ladies and gentlemen.

Juror Harkness: At the present time, and under the present circumstances, your Honor, I do not think there is a reasonable chance.

The Court: Mrs. MacCue, how do you feel about it? [1444]

Juror MacCue: It seems to me that eleven people ought to be able to get together, with the intelligence that the other ten have got anyway. It seems to me that we ought to be able to get together. We are not very far apart.

The Court: Mr. Gibbon, how do you feel about it?

Juror Gibbon: I feel much as Mr. Harkness does, your Honor. I think, your Honor, at the present time there is little possibility.

The Court: Now, what do you mean by "at the present time"? Of course, we are not rushing the jury. We will give you all the time that is necessary for you to deliberate on the case.

Juror Gibbon: It is impossible to predict, of course, what changes might occur, but I see little possibility now of an agreement.

The Court: But you think it is not impossible? Is that it?

Mr. Gibbon: Not altogether, I venture.

The Court: Mrs. Cronk, how do you feel about it?

Juror Cronk: Right at the moment, as I recall our last discussion, it seems that we are at a bit of an impasse.

The Court: And, Mrs. Anderson, how do you feel about it?

Juror Anderson: The same people who are disagreeing now are the people who disagreed when we first started to deliberate, so I question that there is much chance. [1445]

The Court: The situation, then, is about the same, without asking you numerically at all?

Juror Anderson: That is right.

The Court: It is about the same as it was at the beginning?

Juror Anderson: That is true, yes.

The Court: There hasn't been much of a change, then, during the twelve hours that the jury, with the exception of the time at meals, has been deliberating? There hasn't been much change?

Juror Anderson: I believe one vote.

The Court: Mr. Ahlswede, how do you feel about it?

Juror Ahlswede: I don't believe there is any chance at the present time of arriving at a verdict.

The Court: Now, that condition there "at the present time," do you think that if the jury deliberate further or discuss the case further—

Juror Ahlswede: No, there hasn't been any change in sentiment within the last five or six hours.

The Court: Mr. Gould, how do you feel?

Juror Gould: Well, I felt at one time that we were very close to agreement. There are certain questions

we have asked ourselves. I think we are completely confused at this point. I know I am. We have all gotten different ideas. We have tried to figure out what the other person is talking [1446] about, and I think we are in a confused state at this point, but I think it is possible for us to get together. When we can do it, I don't know.

The Court: Do you think it is a matter on which the court can clarify the situation at all? If it is a question of law, the court can clarify it. If it is an exclusive question of fact, the court, of course, cannot invade the province of the jury, and will not attempt to do so.

Juror Gould: There are certain things that would have to be clarified before we get together. I know that. There are certain things that probably the court can't answer; that is, that he can't solve the problem for us. There would probably have to be a certain amount of agreement on the points we need clarified, your Honor. It is hard to say how we can get together.

The Court: Mr. Fisher, what is your opinion on it?

Juror Fisher: Well, I think everybody is over-tired, and I think it would be a better idea to continue tomorrow.

The Court: You think after a rest period, if the jury were to resume its deliberations, that there is a probability of an agreement?

Juror Fisher: Oh, yes. We have reached an agreement partly, but not to the fullest extent.

The Court: I see. Mr. Hall, what is your view?

Juror Hall: I feel that an agreement will be reached [1447] with further deliberation and possibly a clarification of one matter of law.

The Court: Will you state that matter of law, Mr. Hall?

Juror Hall: Perhaps I should say if the court would review the interpretation of that portion pertaining to the conspiracy.

The Court: Mrs. Dabbs, what is your view of it?

Juror Dabbs: I think eventually we can come to some decision. We are certainly trying hard.

The Court: I am sure you are all doing that.

Now, gentlemen, I think there are no accommodations. That is the difficulty in the housing situation at this time. It might be well to let the jurors go home. We could do that only by stipulation, of course,—let them go to their respective homes and return tomorrow and renew their deliberations.

It does seem from the concensus here that there is good reason to feel that there may be an agreement in the case, and, of course, if that can be reached it is certainly desirable. The case has taken practically ten days to try. It has been a very expensive case to both sides, and if it is probable, reasonably probable, that they would be able to agree, I think they should be given the opportunity to do so. But, of course, that is a matter for the litigants to determine, and they must do it by consent, or there isn't any power in the [1148] court to do so, excepting I may say I feel very disposed to give them the opportunity, from the expressions that have



been made. I am rather hopeful that there would be an agreement in the case.

Mr. Doherty: I was going to suggest, after listening to the statements made, if your Honor would feel disposed to ask those that felt if they did go home tonight and came back at 10:00 o'clock in the morning there would be a reasonable probability of a verdict being reached to raise their hands, and then those that feel that no progress could be made in that event, if that opportunity was given them by your Honor, to indicate in like manner.

The Court: What do the gentlemen for the plaintiffs say?

Mr. Jaffe: If your Honor please, the plaintiffs are perfectly willing to stipulate that the jury may return to their respective homes and to return tomorrow for further deliberations.

The Court: I think that I might ask Mr. Gibbon: Do you think that by returning home and resting—I realize that it is late and I realize that you have been working arduously—if that opportunity is given for rest, and then to resume deliberations tomorrow, that there is some probability of an agreement?

Juror Gibbon: Yes, sir, I think it is quite probable.  
[1449]

The Court: Mr. Harkness, how do you feel about that?

Juror Harkness: I believe so, your Honor.

The Court: I think then we had better do that. If there is a reasonable probability of an agreement in this case, it should be had.

If it is agreeable to both sides and is stipulated in the record, I think we shall permit the jurors to return to their homes and then return here tomorrow morning at 10:00 o'clock. Would that be satisfactory?

Mr. Doherty: I was going to suggest, your Honor, 11:00 o'clock.

The Court: I think so. Some of the jurors' homes are quite a distance away, and I think if you are back at 11:00 and then resume deliberations. We will assemble in the court room at 11:00 o'clock in the presence of the parties. Now, particularly when you separate, ladies and gentlemen, do not suffer yourselves to be spoken to or approached by any person concerning the case, and do not talk about the case among yourselves during this separation. Do not form or express any opinion on the case until it is finally submitted to you.

Mr. Doherty: May I speak to counsel?

The Court: I want to say again, without unduly stressing the point, that the case has been a lengthy and an involved case, and an expensive case to both sides, and it should be [1450] decided, if it can be without violence to the individual judgment of the jurors.

Mr. Warne: May we suggest, your Honor, that the request has been made, and inasmuch as there has been a suggestion from some of the jurors, that when we resume tomorrow perhaps the court would be willing

again to read the whole of the instructions of the court to the jury, and that it would be of some assistance to them?

The Court: I would be very glad to, and if you desire to propound any questions at the conclusion of the reading of the instructions; in other words, if the instructions, particularly on the subject-matter that has been stated, are not clear and you propound any question to the court, the judge will try to answer it. You might overnight be thinking of the situation yourselves, and then tomorrow morning we will make another effort to see if there can be an agreement in the case.

You will be excused, ladies and gentlemen, until 11:00 o'clock tomorrow morning. Remember the admonition and be here at that time.

Mr. Jaffe: Your Honor, the stipulation will appear in the record?

The Court: I beg your pardon?

Mr. Jaffe: The stipulation may be set forth in the record, that it is stipulated to? [1451]

Mr. Doherty: Certainly. It is agreed that the jury is to return at 11:00 o'clock tomorrow morning.

The Court: Very well. At 11:00 o'clock tomorrow morning.

(Whereupon, at 12:02 o'clock a. m., Friday, February 15, 1946, an adjournment was taken until 11:00 o'clock a. m., Friday, February 15, 1946.) [1452]

Los Angeles, California, Friday, February 15, 1946.  
11:00 a. m.

(Thereupon the following proceedings were had outside the presence and hearing of the jury:)

The Court: Call the case.

The Clerk: No. 4328-Civil, Larry Finley, and Miriam Finley v. Music Corporation of America, et al.

Mr. Collins: May it please the court: At this time the defendants, in view of the developments which occurred last night, namely, the intimation on the part of the jury that it desired further instructions, we have prepared and are submitting herewith a written request for additional instructions on the part of the defendants. Counsel for the plaintiffs have been served with the copy.

The Court: What is the attitude of the plaintiffs?

Mr. Christensen: With reference to these instructions?

The Court: You have heard the proceedings.

Mr. Christensen: I think these instructions are very unfair.

The Court: You mean you object to the giving of the instructions?

Mr. Christensen: These instructions, yes, sir.

The Court: The court, by hearing you in this matter, is not intimating that it is appropriate or within the rules, the spirit of the rules, to accept from counsel for either [1454] side or the litigants for either side any additional requests to instruct the jury. On the contrary, it is inclined to think that no such requests should be accepted.

The court has read the defendants' request for additional instructions, and in addition to its reason which is assigned, it is of the opinion that many of the requested instructions are embodied in the charge given to the jury and to repeat them at this time, without any request from the jurors that there is anything in the situation that prompts the jury to request any such reiteration, would be prejudicial.

Mr. Warne: May we have a specific exception to your Honor's ruling?

The Court: Yes.

Mr. Warne: Thank you.

The Court: The record should show these, Mr. Frankenberger, so that it will show what they are talking about.

Call the jury.

Mr. Christensen: Your Honor, may I make one suggestion: Would your Honor inquire of the jury if the form of the verdict, it being as to all of the defendants, if that is confusing to them?

The Court: I asked you both about that yesterday and both of you agreed that you were satisfied with the forms of verdict.

Mr. Christensen: Yes, I did that. [1455]

The Court: I don't think I will indicate in any manner, gentlemen, the court's view on the weight of the evidence.

Mr. Warne: May I inquire, does your Honor propose to reread the instructions, as suggested last evening?

The Court: I don't know now just what I shall do. I will do it when the jury comes.

Mr. Doherty: May I make one further inquiry? Do you think if counsel for each side had seven or eight



minutes to reargue certain features of the facts it would be of any help; say, not longer than six or seven minutes each?

The Court: I don't know.

(The following proceedings were had within the hearing and presence of the jury:)

The Court: The record shows that the jury is all present and apparently in vigorous, good-natured appearance.

Ladies and gentlemen, last night when we recessed until this hour of 11:00, there were certain requests made. I think I have them all in mind, Mr. Foreman, but would you mind repeating what those requests were, if you remember them specifically. My recollection is that the jury desired to have reread the instructions of the court on conspiracy.

The Foreman: Your Honor, there were a number of questions. Are you going to read the instructions this morning?

The Court: I am going to comply with whatever request the jury has, so far as I can. [1456]

The Foreman: There was a question regarding the conspiracy, and which was not so important, I think. There was also a question regarding the computation of the damages, which is included in your instructions, we all remember, but we are a little bit indefinite about that, as to just what that said. You mentioned in your instructions about trebling them, if any, and we are in doubt whether we are to treble them or the court trebles them. We didn't know just how that was set, and those points are the principal ones, as I remember.

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The Court: The last question can be answered categorically from the bench at this time, and is answered that if you find damages it is the duty of the jury to treble them. There is no equivocation about that, ladies and gentlemen, and there should be no uncertainty about that.

The Foreman: Thank you.

The Court: Is it desired that the court read the instructions on conspiracy again?

The Foreman: Yes, sir.

Mr. Warne: If the court please, may we be permitted to approach your Honor?

The Court: Yes, you may approach the bench.

(Thereupon the following proceedings were had outside the hearing of the jury:)

Mr. Warne: The defendants request that inasmuch as [1457] the subject of conspiracy and the word "conspiracy" is contained in numerous of the instructions, and referred to, that the whole of the instructions to the jury be reread, in order that the element of conspiracy, as it is generally set out in various places in the context, be given to them in that light.

Mr. Christensen: I think that whatever the court believes would comply with the request of the jury, that that only should be done.

Mr. Warne: May I say this further: We would also specifically note an exception to the reading of any special portion of the conspiracy instructions, for the reason that we believe that it can only be considered, as stated before, in the light of the whole of the context of the instructions.



(Thereupon the proceedings were resumed in the hearing and presence of the jury:)

The Court: Yes, Mr. Foreman?

The Foreman: If the court please, we have had a little discussion here in the jury, and it seems to be the consensus of opinion that we would like to have all of your instructions reread.

The Court: I find that there was a little introductory part given, and I think I ought to read that also. It is all in the transcript, and I will read from the transcript.

"Ladies and gentlemen of the jury: Preliminary to the [1458] instructions I want to express the court's gratitude for the patient manner in which you have apparently approached your duties. It is satisfying to observe the cooperative attitude and the patience that juries manifest and that you have manifested throughout this case, which has been prolonged to some extent. When citizens are taken away from their respective activities, and required to attend at sessions that are protracted, when they do so with the patience that apparently you have, and with attentiveness and the conscientious application to duty, they are entitled to the gratitude of the courts, and for that reason I congratulate you and express our gratitude.

"You are instructed as follows:

"If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.



"If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

"I have not expressed, nor intended to express, nor have [1459] I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

"The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his or her opinion on the case or to announce a determination to stand for a certain verdict. Remember that you are not partisans or advocates in this matter, but are judges.

"It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other [1460] jurors.

“When this case is submitted to you for decision, you are expected and required to determine the various questions and issues presented solely on the basis of the evidence introduced during the trial and the law as given to you in these instructions.

“You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action.

“You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

“You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a [1461] fact or facts.

“You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

“You are to decide this case solely upon the evidence that has been received by the court, and the inference

that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in these instructions, and in accordance with the law as it is stated in the instructions.

“There are two kinds of indirect or circumstantial evidence, namely, inferences and presumptions.

“An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

“A presumption is a deduction which the law expressly directs to be made from particular facts.

“An inference must be founded: on a fact legally proved, or on such deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

“If you find that the facts proven in this case give equal support to each of two inconsistent inferences, then [1462] as a matter of law neither inference has been established, and your verdict must be against the person upon whom rests the necessity of sustaining one of those inferences as against the other, before he is entitled to a judgment.

“The mere fact that this lawsuit was commenced by Larry Finley is no evidence or proof that the defendants, or any of them, have engaged in a combination, conspiracy or agreement in violation of the Federal anti-trust laws, as charged in the complaint. Therefore, you shall not consider the complaint or the amended complaint, or any allegation in either, as proof of any fact adverse to the defendants unless, of course, an allegation has been admitted in defendants’ answer. In this con-

nection, you are informed that in their answer the defendants have not admitted but have denied all allegations of wrong doing on their part.

“Various documents, called exhibits, have been introduced in evidence and their contents have been read to the jury. Among these documents have been the following:

“Plaintiff’s Exhibit No. 6, a bid submitted to the City Council of San Diego by Wayne Dailard, respecting the Mission Beach Amusement Center.

“Plaintiff’s Exhibit No. 8, a bid submitted to the City Council of San Diego by Larry Finley, respecting the Mission Beach Amusement Center.

“Plaintiff’s Exhibit No. 7, three newspaper advertisements published in the San Diego Tribune Sun on May 14, 15 and 16, 1945, respectively, relating to the Pacific Square Ballroom.

“Defendants’ Exhibits Nos. G and H, two newspaper advertisements published in San Diego newspapers on May 11, 1945, and relating to the Mission Beach Ballroom.

“These instruments were admitted not as proof of the truth of their contents, but only as proof that such documents were actually prepared and filed or published, and became material to the case. Their value, weight and effect is for you to determine. Before the jury consider such documents as binding upon the defendants in this case or for the purpose of determining their liability, if any, to the plaintiffs, it would be necessary for the plaintiffs to present other evidence respecting the matters stated in such documents and it would be necessary that



that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in these instructions, and in accordance with the law as it is stated in the instructions.

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such other evidence shows that the defendants participated in the preparation, filing or publishing, as the case might be, of the documents attributed to Wayne Dailard and the Pacific Square Ballroom, or that such documents were prepared in pursuance of a combination or conspiracy of which the defendants were members or participants at the time of their preparation.

“Unless you find from other evidence in the case that the defendants were acting in concert, combination or conspiracy with Wayne Dailard at the time that Wayne Dailard prepared [1464] and submitted his bid to the City Council of San Diego and at the time that said newspaper advertisements were published in behalf of the Pacific Square Ballroom, you shall give such instruments no consideration whatever in arriving at your verdict in this case.

“The plaintiffs in their complaint have charged, among other things, that the defendants have engaged in a combination, agreement and conspiracy to restrain interstate commerce in violation of the Federal anti-trust laws. It is an offense against the laws of the United States to engage in such a combination, agreement or conspiracy. Therefore, before you may find in favor of the plaintiff on such charge, you must find by a preponderance of the evidence that the defendants, or some of them, have engaged with Wayne Dailard in such combination, agreement or conspiracy.

“The meaning of ‘commerce’, as defined by the dictionaries and encyclopedia and other books of that period, show that it included trade, business in which persons bought, sold, bargained and contracted, and this meaning has persisted to the present time.

“The business offices of Music Corporation of America are located throughout the United States and communicate with each other by telegraph, telephone and mail, and in doing so cross state lines. The substantial business of preparing and booking an entire itinerary for the appearances of “name” bands [1465] in various states of the union, which preparation is accomplished by the use of telegraph, telephone and mail, is interstate commerce.

“The anti-trust laws of the United States provide that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal.

“The law further provides that every person who shall combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states shall be deemed guilty of an unlawful act.

“The words ‘restraint of trade’ in Section 1 of Title 15 of the United States Code are to be construed as including ‘restraint of competition.’ Full, free and untrammelled competition in all branches of interstate commerce is the desired end to be secured.

“The determination of whether there has been a restraint of trade or restraint of competition must depend upon the facts and circumstances of each individual case. It is a policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade.

“The law also provides that any person who shall be injured in his business or property by reason of anything

forbidden in the anti-trust laws may sue therefor in any District Court of [1466] the United States in the district in which the defendant resides or is found, and shall recover threefold the damages by him sustained and the costs of suit, including reasonable attorneys' fees."

Now, I think I should, because of the question propounded by the foreman, amplify that statement to this extent, that with respect to the costs of suit and reasonable attorneys' fees, if any, that is not a matter that need engage the attention of the jury. Those are matters that, if the predicates and correlative antecedents are established to the satisfaction of the jury, will require the attention of the court without the jury. But the question as to damages and the threefold character is essentially one for the jury to consider under all of the evidence and under all of the instructions that have been and are now being given.

Now, proceeding to read further from the instructions:

"Plaintiff in an anti-trust suit need not himself be in interstate commerce, and it is sufficient that the combination, if any, which is the cause of his injury, if any, seeks to restrain such interstate commerce.

"The term 'preponderance of the evidence,' as used herein, means such evidence as has, when weighed with that opposed to it, more convincing force, and from which it results that the greater probability of truth lies therein.

"In order for plaintiffs to recover a judgment in this [1467] case against one or more of the defendants, the law requires that plaintiffs prove, by a preponderance of the evidence, each and all of the following facts:

"1. The existence between the months of November, 1944, and March, 1945, of an agreement, combination or conspiracy between one or more of the defendants and Wayne Dailard, to unreasonably restrain interstate commerce in so-called 'name' bands, as alleged in the complaint and the amended complaint, and to the injury of plaintiff"—to the injury of "plaintiffs." There are now two.

"2. The actual restraint of interstate commerce in so-called 'name' bands as a result of such agreement, combination or conspiracy.

"3. Injury to plaintiffs which resulted directly from acts committed by one or more of the defendants pursuant to such agreement, combination or conspiracy; and

"4. Injury to plaintiffs of a kind and extent which can be measured in money, and is not determined merely by conjecture, speculation or guesswork.

"You may not presume that the defendants, or any of them, are liable to the plaintiffs in this action merely because the plaintiffs have filed a complaint, or an amended complaint, charging that the defendants have engaged in a combination and conspiracy to restrain interstate commerce in so-called 'name' bands. The defendants, and each of them, are [1468] presumed to have conducted themselves and their business in a lawful manner until the plaintiffs prove to the contrary by a preponderance of the evidence.

"Evidence has been presented to show that Music Corporation of America is one of the so-called 'big four' booking agencies or personal service organizations which today represents band leaders throughout the country.



You are instructed that such evidence, standing alone and in and of itself, is not proof of any violation of the Federal anti-trust laws.

“During the course of the trial, frequent reference has been made to the American Federation of Musicians, which has been referred to as a labor organization and as the ‘Musicians Union’. The American Federation of Musicians is not a defendant and is not on trial and its policies and practices are not issues in this case. Therefore, you shall not permit any sympathy or prejudice toward American Federation of Musicians to influence your consideration or decision of this case.

“A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

“To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express [1469] or formal agreement for the unlawful venture or scheme with which such persons are charged, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design with which they are charged. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the

unlawful scheme, if any there is, every one of said persons becomes a member of the conspiracy.

“Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, [1470] assists in its prosecutoin, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

“Mere knowledge alone does not make one a member of a conspiracy, either knowledge of the existence of the conspiracy or knowledge of the commission of overt acts or even participation in an overt act, but there must be membership in the unlawful combination by aid, assistance or tacit understanding.

“Certain testimony has been admitted concerning alleged activities and statements of Wayne Dailard, whom plaintiffs allege to be a co-conspirator, but who is not

named as a defendant in the suit. Evidence of these alleged activities and statements, in and of themselves, are not to be considered by you as evidence establishing the conspiracy alleged in the complaint or amended complaint, but such alleged conspiracy must be established, if at all, by other evidence, and must be found by you from such other evidence to have existed at the time of such alleged activities and statements before you would be authorized under the law to consider them in connection with the other evidence.

“During the course of the trial the court dismissed this action as to Jules C. Stein personally. The fact that Jules C. Stein is no longer a defendant in this action is not a fact from which you may draw any inference as to the liability of the defendants who remain” in the trial. “You are not permitted to infer from this fact that the defendants who are still in the case are liable to the plaintiffs.

“The defendant, Music Corporation of America, is a corporation and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is. It has been established that the defendant, Eames Bishop, is and was an agent of the defendant, Music Corporation of America, and that the defendant, Lawrence Barnett, is and was an agent and officer of the defendant, Music Corporation of America, and that their acts and actions in conjunction with transactions involving Pacific Square Ballroom and Mission Beach Ballroom at San Diego, California, were performed by them while acting within

the scope of their authority as such agents. Thus, their conduct, and the conduct of each of them, shall be deemed by you to be the conduct of the corporation, Music Corporation of America. [1472]

“Before you may return a verdict against any defendant you must find that he was a party to a combination, agreement or conspiracy to restrain interstate commerce in so-called ‘name’ bands, and you must further find that Wayne Dailard was a party to such combination, agreement or conspiracy. Depending upon your findings, you may return a verdict against one or more defendants, and in favor of other defendants. In other words, you may return a separate verdict as to any defendant.

“The plaintiffs charge that defendant, Music Corporation, has with Wayne Dailard conspired to monopolize trade and commerce in so-called ‘name’ bands. In the eyes of the law and for purposes of applying the Federal anti-trust laws, the expression ‘to monopolize trade and commerce’ means ‘to control it, to exclude others from trade in commodities in such commerce and prevent them from dealing therein in a free market.’

“A combination which unreasonably limits competition, which would otherwise exist between persons in similar businesses, is illegal.

“The defendant, Music Corporation of America, had a legal right to deal exclusively or preferentially with Wayne Dailard, so long as it did not do so for the purpose of unreasonably restraining or monopolizing interstate commerce in so-called ‘name’ bands pursuant to a combination or con- [1473] spiracy.



“The rule that a trader engaged in entirely private business may freely exercise his own independent discretion as to parties with whom he will deal, is subject to condition that a particular method of doing business must not run afoul of the anti-trust laws of the United States.

“The written agreements between Music Corporation of America and Wayne Dailard, which have been introduced in evidence in this case as Defendants’ Exhibits, numbers E and F, in and of themselves are lawful agreements which the parties had the right to make and to perform.

“If you find that the written agreements in evidence between Music Corporation of America and Wayne C. Dailard represent the entire understanding between the defendants, or any of them, and said Wayne Dailard, respecting the matter of providing bands and musical entertainment at San Diego; and if you further find that there was no other contract or agreement and no combination or conspiracy between the defendants, or any of them, and said Wayne Dailard, as charged in Plaintiffs’ complaint and in Plaintiffs’ amended complaint, then you cannot find for plaintiffs, unless you find from a preponderance of the evidence that the defendants and said Wayne Dailard made and performed said agreements with the intent and for the purpose of restraining or monopolizing interstate commerce in so-called ‘name’ bands. [1474]

“The primary object of award of damages in a civil action—this is a civil action—is just compensation, indemnity or reparation for pecuniary loss, if any, that results to plaintiffs directly or proximately from unlawful conduct on the part of defendants, if any.



“In a suit under anti-trust laws for claimed loss of profits if fact of damages is proved, the amount may be reasonably approximated where based upon competent evidence.

“Evidence has been presented in this case which indicates that the plaintiffs have set up and maintained a set of bookkeeping records covering their operation of the Mission Beach Amusement Center, and that these records list the ballroom income and expenditures separately from the income and expenditures relating to the concessions and other operations of the Amusement Center. In the event that you should find it necessary to decide any issue which requires you to consider these bookkeeping records, you are instructed that you are not bound by the bookkeeping methods used by plaintiffs and you are not required to treat ballroom income and expenses separate or apart from other income and expenses of the Amusement Center as a whole. It is a question of fact solely for you to determine whether the ballroom and the various concessions were operated by the plaintiffs as one enterprise, and whether the expenses shown on the records were necessary, proper, reasonable, and actually incurred. [1475]

“In the event you find it necessary to consider the issue of damages, you are instructed that in an action of this character under the anti-trust laws, the recoverable damages, if any there be, are only those sustained by the plaintiffs from the time the cause of action accrued up to the time suit was brought. Damages, if any, which accrued after the suit was brought are not recoverable in the action unless they are shown to be the result of acts done before the suit was commenced. There is no

claim by plaintiffs that any cause of action accrued prior to the date on which they commenced to operate the Mission Beach Amusement Center and Ballroom, which was February 3, 1945, and the records of this Court show that their suit was commenced on March 20, 1945.

“In an action for damages as a result of a conspiracy by defendants in violation of anti-trust laws, verdict for plaintiffs, if the jury so finds from the preponderance of the evidence, should be for the actual damages sustained, if any, and the amount of actual damages, if any, must then be trebled so that two-thirds of damages will be the penalty.

“In determining the liability, if any, or the amount of damages, if any, of the defendants, or any of them, to the plaintiffs, you should not give any consideration whatever to any evidence which has been introduced in this case relating to the financial worth or wealth of Wayne Dailard. You are instructed that Wayne Dailard is not a defendant in this [1476] action and you cannot award any judgment against him, and his financial worth or wealth has no relationship to the liability, if any, of the defendants, or any of them, and cannot be considered in determining the amount, if any, of the judgment to be awarded in this case.

“In considering the question of damages or the amount of liability, if any,—I want to state there, ladies and gentlemen, in amplification of that statement, and also in amplification of the question of what the court has termed “liability” as distinguished from what the court has termed “damages,” that they are not the same, they are not synonymous matters. You are so instructed. What the court means and what the law states is that so far as

liability in a tort action is concerned it is the obligation to respond for acts done, whereas damages are the pecuniary estimation of the amount of detriment that has been sustained by reason of such wrongful acts, if any.

I will reread that statement, with that amplification, which is also a part of the instructions given:

“In considering the question of damages or the amount of liability, if any, of the defendants to the plaintiffs, you shall not permit yourselves to be influenced by and you shall give no consideration whatever to evidence relating to the financial position or worth of Music Corporation of America or any of its officers or employees, including the individual [1477] defendants” in the case. “In the event, but only in the event, you should first determine that the defendants have conspired or combined to restrain or monopolize interstate commerce in so-called ‘name’ bands shall you consider the question of damages. Thereafter shall you consider the matter of damages, and in so doing you shall award damages only if you find that plaintiffs have suffered loss of profits in the operation of the Mission Beach Amusement Center as a direct result of a combination or conspiracy or unlawful agreement among the defendants and Wayne Dailard, the purpose of which was to unreasonably restrain or monopolize interstate commerce in so-called ‘name’ bands, and in that event you shall consider only such losses of profits, if any, as have been shown by a preponderance of the evidence in the case to be directly and proximately attributable to said conduct of the defendants and in a definite, ascertainable amount.

“Evidence has been introduced for the purpose of showing that during the operation of the Mission Beach

Amusement Center by Wayne Dailard drunkenness, immorality and unsanitary conditions were permitted to exist and that the City Council of San Diego declined to renew his lease because of these conditions.

“Even if you find this to be a fact, you are instructed that no evidence has been introduced to show that the defendants, or any of them, acting in concert, combination or [1478] conspiracy with Wayne Dailard were responsible for any of said conditions. Therefore, in deciding the question whether the defendants have engaged in an unlawful combination, agreement or conspiracy you shall disregard entirely and completely the evidence which has been introduced concerning unsatisfactory conditions at the Mission Beach Amusement Center during the time it was operated by Wayne Dailard. Such evidence is to be considered solely on the question of damages, and then only if and when you find from a preponderance of the evidence that defendants, or one of them, is proven to have violated the anti-trust laws of the United States, as I have stated such laws in these instructions.

“The fact that I have or may instruct you upon the rules governing the measure of damages is not in any wise to be taken as an indication upon my part that I believe, or do not believe, that the plaintiffs are, or are not, entitled to recover damages, for you are the sole judges of the facts. Such instructions are given you solely to guide you in arriving at the amount of your verdict in case you find from a preponderance of the evidence that the plaintiffs are entitled to recover. If from the evidence and instructions I give you, you should find that the plaintiffs should not recover, then you are to disregard entirely the instructions which I give you governing the measure of damages.



When you retire to the jury room, ladies and gentlemen, [1479] you will choose one of your number to act as foreman, and will then proceed to deliberate carefully, cautiously, dispassionately and impartially upon all of the evidence, apply the law which the court has given you in these instructions and throughout the case in its instructions to you.

“When you shall reach unanimous agreement, that is to say, when each and every one of you shall agree upon a verdict, you will have that verdict reduced on one or the other of the blank forms which the clerk has prepared for your convenience only; have it filled out in accordance with your unanimous findings at the appropriate places and spaces by the person whom you choose as foreman, have it dated in the appropriate place, and return into court with the signed verdict.”

That is the charge to the jury. Is there anything further now, Mr. Foreman, that you think of?

The Foreman: I think not, your Honor, unless some of the jurors have some questions to ask.

The Court: If the court can clarify any question, ladies and gentlemen, of course, that is what it is here for. You must not hesitate to ask the court to do so, and if it is a matter which would be improper for the judge to state, I will have no hesitation in telling you so, but I don't want you to be restrained at all from asking for a clarification of any matter that is involved in the case.

(No response.) [1480]

The Court: Apparently there is no such request. You may retire, ladies and gentlemen, or, before you retire, are there any exceptions to the charge?



Mr. Warne: May we approach the bench, your Honor?

The Court: Certainly.

(Thereupon the following proceedings were had outside the hearing of the jury.)

Mr. Warne: Solely for the purpose of preserving a record at this time, may we again object and except to the giving of any instructions requested by the plaintiffs, to which objections heretofore have been urged, upon the grounds stated and urged in our objections, and, further, that we except to the instructions given by the court and not specifically requested, other than the amplification on the occasion of the rereading here today; and that we except to the refusal to give such instructions as were requested by the defendants and which were refused by the court. Further, that we except to the refusal of the court to consider, in the present state of the record, the additional instructions requested, and each of the separate and additional instructions, and ask for an exception as to each of the separate instructions, as proposed, and to the whole of them.

Mr. Christensen: I have no exceptions. I think they are eminently fair.

The Court: The record will show that these objections [1481] and the exceptions are being stated without the hearing of the jury. Both sides will agree to that?

Mr. Warne: Yes, your Honor.

Mr. Christensen: Yes, your Honor.

The Court: The record will show the objections and exceptions.

(Thereupon the proceedings were resumed within the hearing of the jury:)

The Court: Now, ladies and gentlemen, it is about time for lunch, but you had better go upstairs and you will hear from me later.

(Whereupon, at 11:58 o'clock a. m., the jury retired for further deliberations.) [1482] .

Los Angeles, California, Friday, February 15, 1946.  
3:00 P. M.

The Court: The record shows that all the jurors are present. Is that correct, gentlemen?

Mr. Christensen: That is correct, your Honor.

The Court: What do the defendants say?

Mr. Warne: Yes, sir.

The Court: Ladies and gentlemen, have you agreed upon a verdict?

The Foreman: We have, your Honor.

The Court: You may hand it to the bailiff, please, Mr. Foreman.

(Thereupon the verdict was handed to the bailiff, and by the bailiff to the court.)

The Court: Read the verdict of the jury, Mr. Clerk.

The Clerk: Title of the court:

"Larry Finley and Mariam Finley, Plaintiffs vs. Music Corporation of America, a Delaware corporation; H. E. Bishop; and Lawrence R. Barnett, Defendants. No. 4328-M-Civil.

"VERDICT OF THE JURY"

"We, the Jury in the above-entitled cause, find in favor of the plaintiffs, Larry Finley and Miriam Finley, [1483] and against the defendants, Music Corporation of America, a Delaware corporation, H. E. Bishop and Lawrence R. Barnett, and assess the damages in the sum of \$55,500.00.

"Dated: Los Angeles, California, February 15, 1946.

"A. W. Hudson  
Foreman of the Jury."

The Court: Ladies and gentlemen, is that your verdict? So say you one, so say you all?

Jurors: We do.

The Court: The verdict being complete, file it, Mr. Clerk, and judgment will be entered pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Ladies and gentlemen, you are discharged from further consideration of this case. I want again to express our gratitude to you. It has been an ordeal, I am sure. It was a long case, complicated factually, and took up a lot of your time. You came here and patiently listened to it, and conscientiously decided it, I am sure, so you are entitled to the gratitude of the court, and I, therefore, express it to you.

I believe this also completes your term of service. I am very sorry that we will not have the pleasure of your association for some time, at least, but I am sure that your names will go back in the box and hope that we may see you again [1484] some day.

(Whereupon, at 3:05 o'clock p. m., the jury was excused.)

The Court: Gentlemen, the jurors having gone now, I want to say that before the entry of the judgment there is this matter of the costs and attorneys' fees that will have to be arranged. I haven't any idea as to the extent of the legal services, except such as the court is cognizant of by the appearances in court and the taking of the depositions.

I think that counsel for the plaintiffs should prepare a petition, the same as would be applicable in receivership cases or in probate cases in the State Court, setting out specifically the items of service that it is claimed have been performed, serve it upon the other side, and—first, how long do you think it would take you to prepare such a statement, Mr. Christensen?

Mr. Christensen: May I have five days, your Honor?

The Court: Oh, yes, five days. And then the defendants may have five days thereafter, if that would be sufficient, or more if you think it is necessary, in which to consider the application and to file such objections, if you have any thereto, and then we can set the matter down for hearing.

Mr. Warne: I believe, your Honor, there is an intervening holiday in the second five-day period suggested, in which event I suggest that it be a period of eight days.

Mr. Christensen: Could we say five judicial days each? [1485]

Mr. Warne: Well, let's make it a date certain. Then there will be no question about it.

The Court: Today is the 15th. Five days from today would bring it up to next Wednesday. I think probably if you filed it by Thursday, that would be satisfactory. That would be the 21st. The next day is a legal holiday, so suppose we say that the objections are to be filed by Monday, March 4th, by 5:00 o'clock on that day. Then as soon as they come in I shall examine the two documents, and if I consider it necessary, set the matter down for hearing.

Mr. Warne: Now, may I make this additional suggestion, and request this additional action: that the order directing the entry of the judgment in the action, which your Honor directed from the bench,—that that order be vacated and that final judgment not be entered until your Honor has made the ruling and order which is here contemplated.

The Court: I already directed the clerk to enter it under Rule 58. Let me see the rules, please, Mr. Clerk.

(The document referred to was handed to the court.)

"Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk."

Of course, the clerk could not enter it forthwith because the judgment includes the attorneys' fees and the



costs, and in this particular case those items will have to be carefully [1486] considered and determined, so that the entry of the judgment will be stayed at this time, and if we get those petitions and objections by Monday, March 4th, we will stay the entry at this time to and including March 6th, 1946. By that time the court will have determined whether or not it will be necessary to have a hearing on the petition for attorneys' fees, and if it is, we will accordingly extend the time for the entry of the judgment until such time as those matters are definitely adjudicated.

Mr. Warne: May it be stipulated further, and perhaps the rules take care of this in Federal Courts, that any execution on the judgment be stayed until ten days after the determination of any motion for a new trial.

The Court: Yes, I think that is usual and customary.

Mr. Christensen: I have no objection.

Mr. Warne: And until the ruling on that and any other motions which are made coincident therewith, that is, such as a motion for a verdict notwithstanding the judgment.

The Court: So ordered, unless there is an objection.

Mr. Christensen: No, I have no objection, your Honor.

The Court: I want to express the court's gratitude to all of you, counsel. The case, I think, has been well tried and counsel have been very courteous to the court and to each other.

[Endorsed]: Filed March 15, 1946. [1487]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

\*      \*      \*      \*      \*      \*      \*      \*

Los Angeles, California, Friday, September 28, 1945.  
10:00 a. m.

The Court: Proceed.

(Cause called by the clerk.)

Mr. Warne: Ready for the defendants, with this provision, your Honor: Certain depositions, particularly three depositions, were taken by the plaintiff of officers of our corporation. The originals of those depositions were handed to the court reporter for certification and filing on Wednesday of this week, with the request that they be filed prior to today. I talked to the court reporter just a few moments ago and he said they were still on his desk and he would bring them right up here. We have conformed copies in the event it is necessary to use them, and we believe perhaps it will be with reference to some of the issues presented.

Also, if the court please, we have prepared and handed counsel a memorandum, purely in an attempt to suggest the issues presented. I am handing two copies to the clerk for your Honor.

The Court: Who is appearing on the other side?

Mr. Rau: The plaintiff is here, your Honor, by his counsel, Desser, Rau & Christensen, by myself, Jack Rau.

The memorandum which Mr. Warne referred to was handed to me just a moment before it was handed to the court and I have not had a chance to examine it as yet.  
[2]

The Court: The court has not had an opportunity until this moment to see the memorandum. I think the court should state certain of the matters to be explored at this time, as well as the issues to be clarified.

The first matter of inquiry to be made is with respect to the jury. What is the situation with respect to a jury trial?

Mr. Rau: Plaintiff will request a jury, your Honor.

The Court: The case will be tried in San Diego instead of Los Angeles.

The next matter is the matter of interrogatories propounded by the defendants to the plaintiff.

Mr. Rau: Yes, your Honor. Those interrogatories were answered, that is, the interrogatories that were not withdrawn. We served a notice of a hearing—I believe it is on your Honor's calendar for next Monday—objecting to certain interrogatories. Defendants withdrew the interrogatories to which we objected and required us then to file our answers within the time allowed by law, which expired yesterday. Our answers were filed yesterday. Mr. Finley, the plaintiff, has been in the East, as I believe one of the members of our office advised you, and he returned Wednesday afternoon; so we spent all day yesterday getting the interrogatories answered, getting the originals filed yesterday and the copies served on counsel. [3]

The Court: I assume, then, that this notice of motion and motion which were noticed for Monday, October 1, 1945, has become *functus officio* and may be so regarded by the court; is that correct?

Mr. Rau: That is correct.

The Court: The record may so show, Mr. Hansen.

Let us now go through the allegations of the complaint and the answers that have been filed in somewhat of a summary way.

Mr. Warne: May I make a suggestion?

The Court: Mr. Warne.

Mr. Warne: On pages 6 and 7 of this memorandum, your Honor, we point out what I believe to be essentially the only issues that are presented. I am going to invite your Honor's attention to those—there are really five—on pages 6 and 7 of that memorandum.

The Court: The reading of this memorandum refreshes the court's recollection as to the matter which it desires to interrogate counsel about, and that is this matter of damages: How plaintiff expects to establish the damages which he has alleged in his complaint. I will direct that inquiry to counsel for plaintiff.

Mr. Rau: The records of the former operation of Mission Beach by Mr. Wayne Dailard indicate that he made profits of somewhere in the neighborhood of \$170,000, according to the [4] information given to me by Mr. Finley, during the last year of his operation. Mr. Finley tells me that he did not think a great deal of Mr. Dailard's operation and believed that he could improve upon it and double his earnings from that operation.

Mr. Finley has a three-year lease, commencing the first of January, 1945, for all of 1945, '46 and '47. If his estimate is correct, that with his more efficient operation he could double the earnings of Mr. Dailard, then he would earn approximately \$350,000 a year, or slightly in excess of \$1,000,000 over the period of the lease.

Now, the fact is that due to his inability to obtain the ace attractions for the ballroom, he has not been able to earn that profit. The ballroom itself is the principal attraction, the principal drawing card at any amusement beach. It is the attraction which draws the greatest number of people. Because of the great numbers of



people coming to a ballroom and spending their money not only there but in the concessions and other places of entertainment and amusement in the amusement park, that is what makes the park profitable.

I do not know how familiar your Honor is with the operation of amusement parks, but the concessions, various games of skill, and rides and that sort of thing are operated by what they call concessionaires. These concessionaires pay a minimum guarantee, a flat amount per month for their season; [5] and, in addition to that, they pay a percentage of their gross boxoffice take. If you can attract great numbers of people to the park by virtue of a name band in your ballroom, then the take of the concessionaires is greater and the percentage which they pay to the operator of the park is consequently greater.

The gist of this action is the failure of the plaintiff to obtain so-called top-flight or ace attractions for the ballroom, that is, the big name bands which are controlled by the defendant M. C. A. If he had been able to do so, in his opinion,—and he is practical and experienced in these matters—he would be able to double the profit made by Mr. Dailard in Mr. Dailard's operations, in the past years. That is the basis of Mr. Finley's claim to damages of \$1,000,000.

Mr. Warne: If the court please, may I invite your Honor's attention to the answer to the interrogatory made by Mr. Finley? There was an interrogatory addressed to that subject. It is at page 10 of the answers to interrogatories, being answer to Interrogatory XVI.

Mr. Rau: Interrogatory XXVI, I think, your Honor.

The Court: XVI?

Mr. Warne: Oh, I am sorry. It is XXVI.



The Court: A portion of that, commencing on line 24, page 10, of the answers to the interrogatories is just a reiteration of what counsel stated. [6]

Mr. Warne: Yes. Well, I merely wanted to—may I inquire of counsel one question, your Honor?

The Court: Yes.

Mr. Warne: In this it is not contended that Mr. Finley purchased this lease from Mr. Dailard?

Mr. Rau: No, not at all. Mr. Finley acquired his lease by bidding for it to the City Council of San Diego. The City of San Diego owns this park. Mr. Dailard was a former lessee and he bid in competition with Mr. Finley to retain the lease and Mr. Finley was the successful bidder.

The Court: What is the basis for the application of previous earnings at other places to the amusement center which is the subject matter of this case?

Mr. Rau: We are not applying earnings at other places, your Honor, but applying earnings at the same place. Mr. Dailard, who, I advised the court, earned \$170,000-odd during the last year of his operation, earned that at the Mission Beach Amusement Park. You see, he was the former lessee. His lease expired at the end of December, 1944.

Now, that is a fair basis of comparison. The earnings at the same amusement park during 1944 would form a proper basis for comparison for the potential earnings for 1945 at the same place, and '46 and '47.

The Court: Assuming that conditions were the same.

Mr. Rau: Yes. If we have more efficient management and [7] we can establish more efficient management, then we are entitled to prove that we may have earned more.

The Court: How are you going to establish, to the necessary degree of certainty, in an action at law a more efficient management at a time when the individual who is the subject of the inquiry was made manager at such a time?

Mr. Rau: By comparison, your Honor.

The Court: How are you going to compare in a factual way without getting into the realm of speculation?

Mr. Rau: By showing the improvements that Mr. Finley made in the existing structures there, making the premises more attractive to the public, compelling the concessionaires to reduce their prices, which in past years had been quite exorbitant, thereby attracting greater crowds because of reduced prices—I think that would be quite a considerable factor in itself—and by installing additional safety devices, more guards, protection for the public as well as for the concessionaires, and things of that nature.

I think the court will recognize when we introduce evidence of all the things that have been done down there to improve the management, to make more efficient the operation, that there has been a change over the previous operation of the park.

The Court: That will all be capital investment. Now, how are you going to supplement that other than by so-called [8] opinion evidence as to what the results will be of that?

Mr. Rau: I do not think it can be supplemented, your Honor, other than by opinion evidence, by the opinions of persons qualified to testify as to what such improvements would do in the operation of amusement parks. There are such operators not only locally but elsewhere on the Pacific Coast who recognize from experience what

certain improvements will do to improve the efficiency, to improve the management, and create greater drawing of crowds thereby.

The Court: In other words, you take the position that this case is on a parity as far as the principle of prospective profits or anticipatory profits may be concerned with employment contract cases?

Mr. Rau: Yes.

The Court: Where is there any basis in the decisions for anticipatory profits in a case of this kind where you depend upon what a person thinks will be the result?

Mr. Rau: Where there is a record of past experience.

The Court: Past experience of persons who were operators of this specific park?

Mr. Rau: Of this specific place.

The Court: But I understood you to say that you expect to elicit from such persons only the fact that they had made \$100,000 a year?

Mr. Rau: \$170,000, I think it was. [9]

The Court: Now, you add to the capital investment these various items that you mentioned, increasing available concessions and recreational facilities, rather, broaden the facilities, how are you going to establish to any degree of certainty that the difference that would result, the gross earnings or the net earnings that would result, would be a proper measure of damages?

Mr. Rau: May I counter your Honor's question with a supposition in the form of a question?

The Court: Yes.

Mr. Rau: Let us assume that the manager of the Lick Pier at Ocean Park were brought down to the court

to testify before you; suppose he were to testify that at a certain time, as manager of that amusement center, he did certain things which would be comparable to the steps which Mr. Finley took at San Diego, and that, in his opinion, as a direct result of the things he did, the improvements he created, the additional facilities he put in, the business was doubled, trebled, quadrupled, or what you will; just supposing now we are taking a hypothetical situation, I think that would be evidence upon which the court could justify the findings that the doing of the same things in a similar amusement park would produce the like results.

The Court: In your hypothetical question you mentioned the same place, didn't you? [10]

Mr. Rau: No, I didn't. I said, suppose that Mr. Jones or Mr. Smith were manager of the amusement park here; he had done the same thing at Lick Amusement Park that Mr. Finley had done out at Mission Beach Amusement Park, and the result of what he did was to double or treble the business; I think that would be a reasonable ground upon which your Honor could find that the doing of the same things by Mr. Finley at Mission Beach Amusement Park would have the same result.

We are dealing now in the realm of expert testimony.

The Court: You do not think that the applicable area of patronage and the general environmental aspect of the area is an element that would tend to upset the comparison between the Lick Pier in Venice, in Los Angeles County, in a higher and more thickly populated area with similar entertainment at Mission Beach?

Mr. Rau: A comparison would favor Mission Beach, your Honor, because a proportionate growth of population there has continued.

The Court: I am not speaking of the proportionate growth of population. I am speaking about actual facilities for the purpose of enhancing an entertainment project.

Well, I am just suggesting to you what is in the mind of the court, that your measure is speculative.

Mr. Rau: I gather that from your Honor's remarks. I think I can overcome that at the time of the trial. I think [11] I can produce concrete evidence, perhaps based upon opinion evidence, but of experts, which will create a firm foundation upon which your Honor can predicate a proper measure of damages.

The Court: How many experts are you going to call and who are they?

Mr. Rau: Oh, I am not prepared to answer this question. Mr. Finley has spoken to a number of people, some of them in the East, and, as I have advised Mr. Warne before your Honor took the bench, I am going to have to take some depositions back East.

The Court: We are going to limit the number of experts in this case.

Mr. Rau: As to total number, your Honor, or as to each particular phase of each particular issue?

The Court: We are going to limit it as to the total number of experts giving opinion evidence on all phases. The court must place a limitation if we get to trying a case like they try it in a board of directors' meeting, which we are not going to do at all.

Mr. Rau: One particular issue, your Honor, is the definition of "name bands," so-called big name bands.



The Court: As to matters of that kind, of course, I think you would be able to agree, gentlemen.

Mr. Rau: No, we can't. Our opinions vary. [12]

The Court: Why can't you?

Mr. Rau: Well, Mr. Warne and I have never tried to discuss it between ourselves, but in the taking of the depositions that have been taken, both Mr. Warne and I have been the examiners in each case and his questions and my questions and our various objections indicate we do not agree.

The Court: I do not see why, if there are criteria in this line of entertainment and activities, the lawyers cannot agree upon a definition. Of course, if you leave it to your litigants, you will never agree on anything. They would not be in court if they could agree.

Mr. Rau: My suggestion, if it is agreeable to Mr. Warne, is that we leave it to three experts: One of the high officials, preferably, of the American Society of Composers, Authors and Publishers—so-called Ascap—which has a great deal to do with the music and entertainment industry.

The Court: I know a great deal about them.

Mr. Rau: And the second might be, conceivably, the editor of the band section of Variety weekly newspaper, and very possibly the editor of the band section of Billboard weekly newspaper. All three I would be willing to stipulate would be qualified experts.

The Court: That is going to save a tremendous amount of time, Mr. Warne.

Mr. Warne: First, on this disagreement, I don't know. [13] I asked no questions on the disagreement.

Mr. Rau: No. You cross examined.

Mr. Warne: I cross examined. I did not cross examine on the depositions in reference to this matter of name bands. I do not believe there is any serious conflict. I believe that the statement with reference to name bands, as made by our own client as the President of Music Corporation of America, is a fair statement.

I have no objection to a procedure where we could agree upon experts to define "name bands", assuming that that gets to be material. However, the three who are suggested, I think leaves out the most important of all material, the American Federation of Musicians—those are the men who play—plus the fact that a band leader himself, it suggests itself to me, someone like Kay Kayser who has been and has grown to be a name band, and if anybody knows the field he probably does. I do not think we would disagree particularly on choosing some experts.

The Court: I do not see why we should find it either proper or necessary to take up the time of the jury listening to a lot of fellows and girls to probably come up here and tell us what they think of such and such a band.

Mr. Warne: I am in agreement with your Honor.

The Court: It does not help us at all. It just simply confuses the situation before a jury. [14]

It seems to me that the lawyers themselves—and I know that each of you understand the case in principle—should be able to get together and agree upon either the panel of three persons or one person.

I would think, if there were some recognized personality in the industry itself, that might be a solution. We tried a case some time ago that involved this question,

under the Social Security Act, whether a man who had a band—I will call them leaders for want of a better definition, and I am not speaking technically in that respect—but we felt after that case that the best authority in nomenclature was found in those associations who play the instruments, the musicians themselves in their trade organizations I mean. If there is some outstanding person—

Mr. Rau: Mr. Petrillo is the President of the American Federation of Musicians, your Honor.

Mr. Warne: I would agree on Mr. Petrillo. I don't know him.

Mr. Rau: I would not agree upon Mr. Petrillo. I rather hesitate to make a statement at this time as to why I would not, but I would like to assure the court that there is a very good reason why Mr. Petrillo would not be acceptable as the person.

The Court: Who would you suggest?

It would be better to have one person, because, in these [15] artistic matters if you get a panel of three—it is a highly emotional activity, you know as well as I—

Mr. Rau: Yes, sir.

The Court: —and they have very pronounced views and it is hard to manage them so that they can reach an agreement. If you could choose one person it would be better.

Mr. Rau: Either the head or a high executive of Ascap.

Mr. Warne: With reference to Ascap, Ascap has to do only with composers. They have nothing to do at all with bands.

The Court: We have had some musical scores here in cases in which the entity known as Ascap has been mentioned.

Mr. Warne: That is right. They are the organization of authors and composers, and they deal in their business and their officers deal with the interests of composers who write music.

May I suggest another name here of a man—again, I do not know personally—and that is a member of this Bar, a Mr. Bagley, who is a vice president and the only vice president of the American Federation of Musicians. Now, I do not know him.

Mr. Rau: I was about to say with reference to Ascap that Ascap licenses various places of entertainment to use compositions created by their members. Their license agreement—I have never seen one but I have been informed that this is the fact—contains provisions for license fees [16] predicated upon the category of the particular place of amusement using the compositions, and those categories are determined by the type of musical bodies that the place employs. They are divided into what Ascap calls scale bands, which merely receive the musicians' scale; semi-name bands, and name bands.

Now, I do not know what definitions they place upon those, but certainly they have obviously placed some definition in order to differentiate between the various places of entertainment.

I think that since they have already done so, that may be a good place for us to inquire. Perhaps Mr. Warne and I would both desire to inquire independently of each other there.

Mr. Warne: Yes. I have no objection to making an inquiry. I feel that we can probably arrive at some agreement as to making a selection.

The Court: I assume that you can, gentlemen. I do not see how there can be any question between you as to choosing someone, personally.

Mr. Rau: Will you let Mr. Warne and I try and work that out, then, your Honor?

The Court: Yes; both of you try and work it out, providing you can do it within the next ten days.

Mr. Rau: We will try. [17]

The Court: Very well. Let the record show that the parties agree, through counsel, that there will be one expert for that purpose and the name of the expert will be submitted to this court within the next ten days. Is that satisfactory?

Mr. Rau: Yes, sir.

Mr. Warne: That is all right, your Honor. May I say that my suggestions here are without prejudice to a further matter we want to urge to your Honor, at least, at the conclusion of this pre-trial hearing.

The Court: We are simply covering this matter involved under consideration at this time specifically, not generally.

Mr. Warne: Very well.

The Court: Are there any other phases in which it will be necessary to use experts or call experts?

Mr. Rau: Yes, your Honor. That is on the question of damages.

The Court: On the question of damages.

Mr. Rau: That your Honor raised. That is on the question of damages.



The Court: I think that I should limit that. I think it is about comparable to these land cases we have had a great deal of experience in—the more experts we have, the less certain we can be in the findings.

Mr. Rau: Your Honor, this is the reporter with the depositions to which Mr. Warne referred, so they may be filed. [18]

The Court: So ordered.

It seems to me that if you have not to exceed two experts—I would suggest one on each side—but we will not restrict it further than to say that there shall not be more than two on the question of damages.

On all general questions and specific questions relating to damages, or concerning which the witness is called to testify as to damages or lack of damages, it shall be limited to not to exceed two witnesses on each side.

I would like to hear from counsel for plaintiff, first, an estimate, if you can give it, as to the time that will be required to try this case with a jury.

Mr. Rau: As nearly as I can estimate that, your Honor—and I have thought about that question—I could only approximate that it should take about a week.

The Court: Could you fix a limit a little more definite than that?

Mr. Rau: I think the plaintiff's case should not take over two and one-half or three days. That is the best I can tell your Honor at this time. I am not prepared to make that a positive limit to which I would like to be bound, because of the taking of the depositions which we still have to take and circumstances that may arise.

The Court: Of course we cannot limit litigants to saying precisely one day or two days or three days, but

we think we [19] ought to be able to get from counsel in all cases a reasonable limitation as to the length of time that it may take.

Mr. Rau: Without taking into consideration the time required for the selection of the jury, plaintiff's case probably will not take more than three days. I do not know how long the defendants should take—possibly less than the plaintiff's case; and I do not know what rebuttal will be required. In my opinion, a week or maybe six court days should do it.

The Court: Now, I am going to ask Mr. Warne, for the defense, what his estimate is, assuming that the case goes ahead and that it is not disposed of excepting by hearing before a jury.

Mr. Warne: Yes. My own thought is that it would take at least six and perhaps up to ten court days, your Honor.

The Court: You think ten court days in any event or under any conditions would be sufficient?

Mr. Warne: I would say, ought to be sufficient. Manifestly I cannot anticipate entirely what will be required by way of proof.

The Court: Would you agree to that, Mr. Rau?

Mr. Rau: That ten court days would be a reasonable time; yes, your Honor.

The Court: Would be sufficient time?

Mr. Rau: I think two weeks, that is, ten court days, [20] would be sufficient time, your Honor.

The Court: These depositions, which I notice are quite voluminous here—I have not seen any of them excepting at a distance—is it expected to read any of these depositions to the jury in the trial of the case?

Mr. Rau: These depositions, your Honor, are depositions of Mr. Stein, who was one of the defendants, Mr. Barnett, a defendant, Mr. Bishop, a defendant, and Mr. Howard, an employee of defendant M. C. A. They will probably only be used for the purpose of impeachment. I doubt very much if they will be used to read to the jury.

The Court: Are all depositions taken that will be taken in the case by either side?

Mr. Rau: No. We still have depositions to take, your Honor, and there is one that has been taken which has not been filed as yet because it has not been signed.

Mr. Warne: We would anticipate that there would be no necessity for depositions unless the time of trial is such that some of our witnesses will not be presently available. At the present time we intend to have available witnesses who will be put on the stand.

We are going to take, and have arranged to take and deferred it by reason of Mr. Finley's absence, the deposition of the plaintiff, but not for use upon the trial; that is, we do not anticipate its use upon the trial. It is purely for [21] discovery.

The Court: When is it reasonably certain that all of the depositions which are to be taken or have been authorized to be taken will be taken and completed and filed?

Mr. Rau: I would say within the next 90 days, your Honor.

The Court: And, as far as the defendant is concerned, could you answer that question?

Mr. Warne: I will say that within the same period of time, sir, without question.

The Court: Is the court to gather from that the impression or belief that the case should not be set for trial before 90 days?

Mr. Rau: That is my suggestion, your Honor, if I may be permitted.

The Court: What is your idea on that, Mr. Warne?

Mr. Warne: Well, insofar as the 90-day period, we would be prepared for trial prior to that time, assuming these depositions are in and after we have taken the deposition of Mr. Finley.

We do not know what matters the plaintiff will attempt to produce by witnesses to be taken in the East, as they stated. My thought is that as soon as they are taken, I would say that the case should be ready for trial within 30 days thereafter, without question. [22]

And I would like to say this, also: If there are depositions which are to be taken in the East, in order to expedite it, I am required to go East on the 9th of October and I would like to have them in that following week. I will state that to counsel now, and that I would like his cooperation in having them taken during the period of the week of—this will be the 7th—the week of the 16th of October.

Mr. Rau: I cannot answer yes or no to that question as yet, your Honor. Mr. Finley just arrived back from New York Wednesday. We worked on the answers to the interrogatories yesterday, and he went to San Diego, where he expected to remain all of next week and will return to Los Angeles the following week. I told Mr. Warne generally last night that he could take Mr. Finley's deposition during that following week, when he is in Los Angeles, by stipulation.

The Court: That would be the week of the 8th.



Mr. Rau: That would be the week of the 8th.

The Court: That date would be agreeable to you to take the deposition here?

Mr. Warne: I am leaving on the 9th. I would like to take it this next week if possible.

Mr. Rau: He will be in San Diego next week.

Mr. Warne: He can come up for a day to take his deposition.

Mr. Rau: No. He is going to leave for the East in about three weeks and he has a lot of things to do down there. [23]

The Court: I think we ought to get the case to where it can be tried before 90 days. I do not see why it should take you 90 days.

Mr. Rau: I am leaving sufficient leeway for circumstances which may arise. It should not take 90 days to take the depositions.

The Court: The case should have been filed in the Southern Division. I keep repeating that, gentlemen. I want to impress you that that is where the case should have been filed originally.

Mr. Warne: We did not file the case, your Honor.

The Court: I know you did not. But the clerk did not consult the court when accepting it for filing. If he had done so, he would have been told not to accept the filing for the Central Division. This case was filed on March 20th of this year, and the answer is—

Mr. Warne: The answers were filed not until sometime later, your Honor. The time was extended to file the answer.

The Court: July 2nd one answer was filed. So that here it is September the 28th, 90 days from this time—



October, November, December—that will take almost nine or ten months. That is a long time.

Mr. Rau: I was going to suggest, if I may, that it be set in January so that we do not have it coming during the Christmas holidays. [24]

Mr. Warne: That would be satisfactory, I think, having in mind the fact that some of these witnesses or a number of them are engaged in the amusement industry and there is always a Christmas-time extra activity in amusements.

Mr. Rau: January would be a very satisfactory time for the witnesses; I know that, your Honor.

The Court: Then it may be set, by consent of all parties, for a day in January?

Mr. Rau: Yes, your Honor; any time convenient to your Honor's calendar.

The Court: The next term in San Diego commences on the second Monday in January; that will be January 8, 1946. Usually on the first day of the term, and probably that week, they will have an accumulation of matters. Suppose we set this case for the 14th?

Mr. Rau: Is Monday a law and motion day in San Diego as well as here?

The Court: No. We have the law and motion day there on the first day of the term usually, and if matters accumulate, we hear them at such times as it may be convenient.

Pardon me, I miscalculated. The 14th is the first day of the term, as well as the second Monday in January. I think we had better put it over until the next week.

Mr. Rau: January the 21st, your Honor?

The Court: Just a second. I am thinking of one or two [25] other matters. I think January the 21st is a more satisfactory date.

Mr. Rau: That is agreeable to the plaintiff, your Honor.

Mr. Warne: As to the date, the date is agreeable.

The Court: By agreement, cause set for trial January 21, 1946, in the Southern Division of this court at San Diego, California, with a jury.

Mr. Warne: If the court please, when saying that that is satisfactory and we are willing to stipulate to it or consent, that is without prejudice to any other motions or applications we may make in the interim.

The Court: Neither side waives any objection other than an application to continue the case.

Mr. Warne: I understand that.

The Court: That is waived by both of you.

Mr. Warne: Yes.

The Court: And it is so understood, gentlemen. That is all that I have, I think, that the court of its own initiative desires to pursue on this pre-trial. It being a jury trial, it is a little more restricted than otherwise it would be. I would explore many of these issues a little more thoroughly if we were not going to have a jury, but I do not want to convert the case into anything but a jury trial, and even the broadest interpretation of Rule 16, the right of trial by jury, should be preserved. I think that we have circumscrib- [26] ed it sufficiently in the matter of expert witnesses and the agreement of counsel to designate some one person within ten days who will act as an expert to describe these bands in their proper nomenclature in the industry, and that is as far

as I care to go. If either of you have any further suggestions, I shall be glad to hear them.

Mr. Warne: If the court please, there are certain matters. But first, I would like to obtain from counsel in connection with this pre-trial hearing a stipulation as to a fact. I have here a photostat of the original bid for the lease of the Mission Beach amusement center, dated October 30, 1944, addressed to the Mayor and City Council of San Diego, and bearing what purports to be the signature of Larry Finley on page 13. I obtained this from the office of the City Clerk in San Diego. I would like to have counsel stipulate that he did file such a bid or application as this is.

Mr. Rau: Mr. Warne showed me this before, your Honor, you took the bench. I have never seen it, so I am not prepared to stipulate that it is a copy of the bid Mr. Finley filed. It does not appear to have been certified as a correct copy by the City Clerk. I do not know.

The Court: May I see it?

Mr. Warne: The red pencil portion is not a portion of it. I put the red pencil portion there.

The Court: There are some phases of it, for instance, [27] on page 1 of this proffered exhibit, which is marked for identification—mark this.

The Clerk: Defendants' A for identification.

The Court: The lines are not numbered, but down about half way, commencing with the third paragraph on that page, which reads thus: "Following are the terms under which I wish to make any bid for the lease.

"1. Agreed as stipulated."

There does not seem to be anything in this proffered document that indicates what is meant by that statement: "Agreed as stipulated."

Mr. Warne: The pertinency of the exhibit does not refer to that portion of the document and our offer of it goes only with reference to another fact or recitation in the document itself.

The Court: The only point in counsel's declination to agree with you that the instrument might be received here for such use as is proper before the jury would be limited to the fact that it is not complete in and of itself; and that is the reason I call to your attention that statement: "Agreed as stipulated." Where is the stipulation and where is the document?

Mr. Warne: Apparently that is a pure recital of the creators insofar as we know. Insofar as the offerer or the bidder is concerned, he may have had private conversation with [28] the City Manager; but we are not concerned with that, nor is it a fact which we will seek to elicit, nor do we offer any part of that—only the portion which is contained as a writing in his bid.

The Court: I think the plaintiff should be required to say whether or not this is his signature, whether or not this is the document.

Mr. Rau: I have not had a chance to examine it, your Honor.

The Court: I am not saying that you should do eo instante, but you should do so within such time as the court thinks is reasonable for you to ascertain the truth. If it is a fact, it belongs in the case. We should not take up the time in a jury trial to lay foundation and hear argument. That is what Rule 16 covers.



Mr. Rau: I know Mr. Finley filed an application with the City Council and I know the senior member of our firm has seen it. I, personally, have not. If I may have an opportunity of showing this to Mr. Desser or Mr. Finley, I will be quite happy to stipulate.

Mr. Warne: May I make a suggestion, your Honor? I have a positive of this photostat and will be glad to submit that to counsel, and then within ten days, if he wishes to enter a denial, he may.

Mr. Rau: Certainly. [29]

The Court: Will ten days be satisfactory?

Mr. Rau: Satisfactory, your Honor.

The Court: So ordered. It is agreed, then, that this proffered exhibit which has been marked for identification will be examined by the plaintiff and his counsel, and that counsel for plaintiff will indicate and file herein within ten days from this date a statement as to whether or not it is agreed that this was the document as suggested by counsel for the defendants; and that thereupon no further proof as to its preparation or as to any foundation for its introduction in the case will be entertained by the court unless it is denied authenticity. It may be filed. That ruling just made I presume is agreeable to both you gentlemen?

Mr. Rau: It is agreeable, your Honor.

Mr. Warne: It is satisfactory.

Now, if the court please, upon the pleadings of the case and upon the answers to the interrogatories as they have been made, received yesterday, and analyzed only in part as yet by ourselves, and under other undisputed facts which are by reference to the answers to the interrogatories established as facts, in our opinion, without any question, no case is made or no proper claim is made



for the maintenance of an action under the anti-trust laws.

I realize that your Honor made suggestion that factual matters here were factual matters which should be tried to a [30] jury. However, I would like at this time and I would, on behalf of defendants at the conclusion of this pre-trial hearing, move the court that under the pleadings, and, as I say, the answers to the interrogatories and the admissions as made by the defendants, that the action be dismissed.

I should like to suggest, your Honor, this: In part, I would like to have the points of this analyzed very briefly as the points which we would like to urge. I would like to also, if your Honor feels that the points have merit—and we believe that they do—be permitted to file a memorandum in support of the application.

First, I would like to have your Honor hear an analysis of the points themselves and we believe, irrefutably, that the points can be made; that there is no case for the plaintiff on the pleadings and on the admissions which he makes in his interrogatories. I would request that, your Honor, at this time.

Mr. Rau: The question of a motion to dismiss the case, your Honor, has been argued before your Honor once already and briefs have been filed and your Honor decided that matter. Mr. Warne says that he proposes to renew his motion upon the pleadings and upon the answers to the interrogatories.

I think such a motion would be premature because plaintiff likewise intends to serve upon the defendants interrogatories which have not as yet been prepared. I think such a motion [31] might conceivably be considered by the court after both parties have served and have

answered their interrogatories. Until that time I do not believe it is a proper motion. I am not even conceding that it would be a proper motion after that time, but in any event I do not think this is the proper time for it.

The Court: We are not going to review the rulings which were made on the pleadings. We are satisfied that they were correct under the state of the record which existed and which now exists under the pleadings.

One of the features of the interrogation of counsel as to how long it was going to take to get all these depositions in was directed to that very phase of the case. I do not think that we should await 90 days' time to get these depositions in. I think we should have the depositions, if they are going to be filed here—and they should be filed if they are taken—within at least 30 days before the date set for trial so the court can go over them; and all of the depositions should be here, filed and completed so that the court may examine them within thirty days, especially where we are going to have a jury. I do not wish the jury to wander off on extrinsic, collateral and immaterial matters. In other words, we are going to keep the case a lawsuit in the Federal Court instead of an atmospheric episode in some other forum.

Those depositions should all be completed and filed at [32] least 30 days before the date which has been set for trial. It would be a lot better to have them here two months before the date set for trial and the judge go over them as he should.

I do not believe I care to hear any argument on the pleadings now as to anything. It would probably save

you time until all the depositions are in. There isn't any factual situation before the court at the present time that was not here at the time that the argument was made on the complaint, except the interrogatories and the stipulations that were made today and these depositions which have been filed today, which the court has not had an opportunity to read at all.

Mr. Warne: That was one of the reasons why I suggested to your Honor, having in mind the answers to the depositions—and I am speaking advisedly now—the answers and admissions in the depositions. I say that those, as related to the issues made by the pleadings—and, your Honor, we do not want to argue again the sufficiency of the pleadings or the sufficiency of the complaint. That is not the purpose at all. It is the fact that this lawsuit, patently, by the answers in the depositions or to the interrogatories made by Mr. Finley, is no lawsuit. As I say, I believe I speak advisedly. We have made considerable research covering the issues in a case of this kind. The interrogatories which we prepared, while not full discovery and not in full length a deposition, [33] we believe puts Mr. Finley in a position where his answers entirely negative any lawsuit on his part in this action.

The Court: I think probably we should await the taking of the deposition of the plaintiff, Mr. Warne. We may be trying the case on one side of the question.

Mr. Warne: I understand.

The Court: These are all depositions on unilateral aspects of the case. If we get Mr. Finley's deposition here—and I understand you are going to be prepared to take it in the next two weeks.

Mr. Warne: Correct. We want counsel to arrange for it.

The Court: Why can't you bring him up here and take that deposition next week?

Mr. Rau: I will try, your Honor. I expect to be talking with him either tonight or tomorrow sometime.

Mr. Warne: I will start taking it tomorrow.

Mr. Rau: I said I expected to be speaking to him tonight. I did not say I expected him to be up here. He was here yesterday. He has been back east for about three and one-half or four weeks and he has great business interests in San Diego, and after that the man has business interests here. The man has just returned and I think he is entitled to devote a little time to his own business interests. I did not ask Mr. Warne for any favors. I served subpoenas upon his witnesses. I am willing to stipulate to the taking of Mr. Finley's [34] deposition, but I suggest it be at a time agreeable to the party concerned, at least, and that would be the following week. That I suggested before I ever knew Mr. Warne was going away. The first I knew that was this morning. I suggested to Mr. Warne last night that the deposition be taken week after next.

Mr. Warne: We could be arbitrary and serve a notice, counsel, and the witness would have to be produced here at an arbitrary time. I am willing to stipulate to any date next week, starting any time, any hour of the day or evening counsel wants.

Mr. Rau: Mr. Warne stated he was leaving Los Angeles on the 9th. I assume he is leaving on the Super Chief.

Mr. Warne: No, on a plane.



Mr. Rau: The depositions, as far as I am concerned, may start at 9:00 a. m., or 9:30 a. m., on Monday, the 8th.

The Court: I think that is fair.

Mr. Rau: Pardon?

Mr. Warne: All right.

The Court: I think that is fair. It is agreed, is it, that this deposition be taken of Mr. Finley on Monday, the 8th day of October?

Mr. Warne: Starting at 9 o'clock, Mr. Rau. OK, 9:00 a. m.

Mr. Rau: Well, I will be there at nine. Mr. Finley is in the entertainment business and he works quite a lot at [35] night.

Mr. Warne: All right; ten.

The Court: Ten o'clock on that date. So agreed, gentlemen?

Mr. Rau: Yes.

Mr. Warne: Yes. It will be at our office.

The Court: So ordered.

When the deposition is taken and filed, I am not going to restrict either of you from interposing any motions which are appropriate. I just want the understanding that there is not going to be any motion entertained, that is, looking from either side, to a postponement of a trial of this case. But any other applicable motion, of course, the court will always be open to entertain, but I think that motion should be deferred until we get the particular deposition of the plaintiff.

Mr. Warne: One other thing in connection with the depositions in the East. I would like counsel's cooperation. I would not like, either myself or to have someone



else, make a separate trip East, because I am leaving on the 9th.

The Court: The following week you suggest?

Mr. Warne: The following week, any time.

Mr. Rau: I don't know, your Honor. I don't know that the witnesses are available. I have to communicate with them and find out. [36]

Mr. Warne: I would like the suggestion that counsel cooperate in an attempt to bring it within that period while I am still in the East.

The Court: He has been quite cooperative.

Mr. Rau: I think I have been too.

The Court: He has been quite cooperative and I think he will continue to be so in order to properly expedite this matter.

Mr. Rau: If it is convenient at all, I will try and accommodate Mr. Warne if I can do so. If I can't, he will simply have to designate counsel from the East to appear, as I expect to have to do myself.

The Court: He will be at a disadvantage if you are there and he is not.

Mr. Rau: Yes. I say, he will have to designate counsel in the East. I do not intend to go back East for the purpose of taking the depositions, unless I have some other business to take me there.

Mr. Warne: There is one other matter, your Honor, on the taking of the deposition of Mr. Finley. I had written sometime ago that he be produced for the taking of his deposition and I requested also that there be produced financial statements, all of which have been out-

lined. You have the letter there, (Mr. Rau). May I see it?

A copy of the lease between Mr. Finley and the City of San Diego; a copy of the bid for the lease; I asked for that [37] also and did not obtain it; originals or copies of contracts entered into by Mr. Finley for amusements for appearance, to exhibit an entertainment at the Mission Beach ballroom from the time he took it over down to this date, together with settlement sheets of accounting insofar as those are concerned; auditor's and accountants' statements, balance sheet, profit and loss statement concerning the operations rendered to or received by Mr. Finley, limited to all financial and money transactions which have occurred in the operation of the Mission Beach ballroom from November, 1944 to this date; November is the time when he obtained the concession; and auditors' statements of similar character covering the profit and loss statements and balance sheet for the operation of the Mission Beach Amusement Park—counsel referred to two entities, namely, the ballroom and the park—together with some other detail of accounting which I have enumerated in a writing handed to Mr. Rau; also the publicity file—ordinarily these operations have a publicity file in which their publicity is kept, copies of their publicity—and I want also copies of correspondence between the Mission Beach ballroom or Finley and Fredericks Brothers, William Morris Agency, and General Amusement Corporation. They are the large agencies who have booked attractions there.

All of this has been covered by specific detailed letter, is all pertinent, I believe, and we would request that those [38] be made available.

The Court: That was written by you to Mr. Rau?

Mr. Warne: Correct; under date of September 7th.

Mr. Rau: I suggested to Mr. Warne, your Honor, that his demands were, in my opinion and the opinions of my associates, much too broad; that I felt the proper thing to be done in the case of the documents, where his demands were as broad as they are, would be to present to your Honor an application for the issuance of a subpoena duces tecum and let your Honor pass upon the pertinency of these various things. That is a matter that may be done very easily and in a very brief time; and if there would not be time to properly get the subpoena served for the hearing of the deposition on October 8th, I would be glad to agree that the time may be shortened for that purpose. I think your Honor should pass upon the application.

The Court: I think that is correct, if you cannot agree as to the materiality or relevancy of some of these matters.

Mr. Warne: May I then limit this, your Honor, at this time and say that all we want on the taking of his deposition at this time is accountants' statements showing a balance sheet, a profit and loss statement, a statement of operations of the Mission Beach ballroom and of the Mission Beach Amusement Park, and from the time that he commenced down to this date. [39]

Mr. Rau: An accountants' statement is pretty broad and it is not the best evidence, your Honor, in the first

place. In the second, I would like to inquire why, if that is all Mr. Warne wants, he attempted to get me to consent to produce all of these other things. I think he ought to submit the application to your Honor.

The Court: You can put that statement in an application for subpoena duces tecum this afternoon and present it to the court.

Mr. Warne: The thought I had in mind, I would like to be relieved of the necessity to find Mr. Finley and serve him with a subpoena. That is the sole matter. I am not concerned with the materiality of it, and I certainly do not want any documents or any papers which are improper.

Mr. Rau: Mr. Finley will be at either one of two places: Either at the Mission Beach Amusement Park or the Trianon Ballroom, San Diego, all this week.

Mr. Warne: May I ask this: Will counsel accept voluntarily, without any copy of the subpoena, as being sufficient for the purpose of making it proper process, and produce the documents accordingly?

Mr. Rau: I think so, your Honor.

The Court: I did not hear that, gentlemen. I was looking at these papers.

Mr. Rau: Your Honor has already pointed out that I have [40] been cooperative, and Mr. Warne is now asking me to accept service of a subpoena duces tecum. I will go that far as well. I think I am being more than cooperative.



The Court: That disposes of it, then.

Mr. Warne: Thank you.

The Court: That is about as far as we can go, gentlemen. And the record will show the agreements as stated by counsel, and that orders are made pursuant to such agreements and in such other matters as the court may deem requisite.

This pre-trial hearing is adjourned, without prejudice to calling it again at the instance of the court.

Mr. Rau: Very well.

The Court: I think the reporter should transcribe his notes, gentlemen.

Mr. Warne: We will want a copy.

The Court: And the court impose it as costs, later, upon the proper party, at the conclusion of the case.

Mr. Rau: Mr. Reporter, may I have a copy?

The Court: The court would like to have a copy, gentlemen, but won't be able to get one unless you gentlemen agree to furnish it.

Mr. Rau: Counsel, will we agree to divide the costs of the copy of the transcript for use of the court?

Mr. Warne: Divide the costs, correct.

Mr. Rau: So stipulated. [41]

Mr. Warne: Yes.

The Court: So ordered.

[Endorsed]: Filed Dec. 7, 1945. [42]



[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

\* \* \* \* \*

Los Angeles, California, Friday, December 21, 1945.  
2:00 p. m.

The Court: I think we might as well call the Finley case. Counsel all seem to be present.

The Clerk: 4328-Civil, Larry Finley v. Music Corporation of America, et al.

Mr. Warne: We are here to attend the conference your Honor suggested relative to this case.

The Court: Gentlemen, the main purpose of calling the conference was to acquaint all of you with the changed condition in the court's calendar. When this matter was before the court originally, it was ascertained that inadvertently it had been assigned to the Central Division, when in fact it should have been a Southern Division case. We proceeded to hear the preliminary motions and matters that were projected in the case here in the Central Division, and in the course of those activities the court indicated, upon ascertaining that a jury would be required, that the case should be tried in San Diego in the Southern Division, and that is still the order.

Now, the situation in the court is this: one of the judges is away and has been away, and probably will be away for some indefinite period in the future. That situation necessitates the judge of this division who happens to be senior in commission in the district, to remain in Los Angeles, [2] if possible, during the month

of January, in order to prepare for the opening of the February term in the Central Division of the court and the attendant empanelment of the jury, grand and trial, and other administrative matters that must be transacted in that time by the senior district judge of the district in a multiple court. I thought I would call this to counsel's attention, and if it is still the joint feeling of all of you that the case could be more satisfactorily tried in Los Angeles in the Central Division of the court than in San Diego, you might respectively submit your views in that regard.

Mr. Warne: Certainly, in the first instance, when it was suggested by Mr. Rau that it was desired to try it here, we stated at that time that it was agreeable to us and that we felt it would be more agreeable to all of the parties and the witnesses, in so far as their convenience was concerned, to try it in Los Angeles, because I believe practically all of the parties defendant live here—they, all of them, I know do live here, and, secondly, the principal office of the company is here and not in San Diego, and all counsel for the defendants live here. We were also advised at that time that Mr. Finley, while he maintained a residence in San Diego, was in Los Angeles most of the time, or at least a good part of the time, and I believe his affidavit has been to that same effect. It is our own view that the case, for [3] the convenience of witnesses, certainly, and counsel, had best be tried in Los Angeles.

The Court: What is your judgment, on behalf of the plaintiff?

Mr. Christensen: It is immaterial to us.

The Court: Well, I would like to have you express yourself on it. Originally, I believe you thought that it would be preferable to have it tried in the Central Division.

Mr. Christensen: Yes, your Honor, and I have no reason to change my mind on that. If, as your Honor appears to have held originally, it should be tried in San Diego, we are willing to have it tried there. If now, for the convenience of the court, it should be tried here, we are perfectly agreeable, and we still believe that it would be more convenient for us. What Mr. Clore Warne has just said is the truth of the matter.

The Court: Then I think we will conclude that the trial be held here, and we will retain the same date, of course, for the trial. I think that was January 21st, was it not?

Mr. Warne: It was set for January 21st. If the court please, in that regard we have just gotten word that one of the witnesses, and one of the principal clients of ours, is required to be in the East, not by reason of any personal business of his, but because of matters involving certain organization work of the American Federation of Musicians, [4] and if a date even a few days later than the 21st of January could be set, that is, that the court could give us such a date, we would

prefer it. The following week would be sufficient, in so far as we are concerned.

The Court: What do you say about it, gentlemen?

Mr. Christensen: I don't think that would seriously interfere with anything that we have scheduled.

Mr. Warne: I am just advised by Mr. Ross here that that situation has obviated itself in the East, so that the 21st will be satisfactory.

The Court: Then let's leave it for the 21st.

Mr. Warne: That is a motion day in your department here, your Honor, isn't it?

The Court: That is true. I set it for the 21st assuming that it would be called in San Diego, so that it will have to go over until the 22nd here. That will be Tuesday. Just let me examine into the matter. Let me have the calendar, please.

(The document referred to was handed to the court.)

The Court: That is Monday. The 21st of January, 1946, is on Monday, so we will not leave it set here on a Monday. We will set it for Tuesday; Tuesday, the 22nd of January. I have a brief calendar here, and I am checking on the day. It will be January 22nd, 1946, at 10:00 o'clock a. m., in the Central Division, at Los Angeles.

Mr. Christensen: Your Honor says "the Central Division." [5] You mean in this court room?

The Court: Yes. Mr. Hansen calls my attention to the fact that there is a case which I have already set

for that day, a jury case. That case should not take over two days, or I think three at the most. The case of Reynoso v. Pacific Electric Railway Company is set for January 22nd, and I don't believe I can displace that case. It is an action for damages for the death of one under an allegation of negligence. It has been on the calendar for some time.

I believe you have said that this case would take two weeks to try. I believe that was your estimate, Mr. Christensen?

Mr. Christensen: I think that is a fair estimate, your Honor.

The Court: And I think you concurred in that?

Mr. Warne: I concurred in that, yes.

The Court: I will have to set it, then, on the 29th. That may congest the calendar here, as I notice we have cases set for February 5th and February 11th, but I think we will reset it for the 29th, January 29, 1946, at 10:00 o'clock, and by consent cause it to be transferred to the Central Division. We will reset it for that date.

Now, while this is not a pre-trial hearing, there are one or two matters which I think I should discuss now, and that is on the issue of so-called "big name bands." I want to know [6] how many witnesses each party intends to call, and if there is no reason why they should not disclose it, to give the names of the witnesses that will be produced to testify on that issue. I will ask the plaintiff first.



Mr. Christensen: I am not prepared, your Honor, to tell you that. You will recall that at the time of the hearing Mr. Finley had been away. Now, he has been back, and I was with him that day, and I have my next appointment with him on Wednesday, the day after Christmas, and we have had under consideration different persons. I think I indicated to you at the time that we believed that Benny Goodman would be here. I am not certain that he will be. I use that by way of illustration of these people. I don't believe I could answer the question truthfully at this time.

The Court: I think I limited the number to be called on that issue at the first pre-trial hearing.

Mr. Warne: No, your Honor limited the number to be called on the issue of damages. You suggested on this that we try to agree upon a name, but to date we have not been able to do so.

The Court: If the plaintiff is not able to give us that information, I will not require the defendant to do so.

Mr. Christensen: I would be glad to, if I were able to.

The Court: There is another matter I have in mind. I don't recall that there is in the record or in any of the [7] depositions any contract between the Music Corporation of America and any one of the leading bands or band leaders. I don't recall anything in any of the depositions or in the record that disclosed it.

Mr. Christensen: I think there is a form of contract that is attached to one of the depositions. Isn't that right, Mr. Warne?

Mr. Warne: Yes, it is an exemplar form of contract which is used between band leaders and Music Corporation of America, and all other agents, it being a form prescribed by the American Federation of Musicians. The testimony of Mr. Stein was that our company, the MCA, had contracts with a number of band leaders. Also, the testimony of Mr. Lawrence Barnett named a number of band leaders with whom contracts of that character and on that form were made.

The Court: On that form?

Mr. Warne: That is right. There is only the one form permitted, as I understand it.

The Court: That answers it.

Mr. Christensen: The fact that—may I make one comment on that? The fact that it is stated that it is not only with the band leaders and MCA, but with all other agents, should not be construed to mean that we concur that that is the legal effect of the contract, but we simply say that that is the form of contract used by MCA, according to their story, [8] and is attached to one of the depositions.

The Court: Those are the only matters I have in mind, gentlemen. I think now they have been clarified. So we will meet on the 29th to try the case.

[Endorsed]: Filed Feb. 18, 1946. [9]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

\* \* \* \* \*

Los Angeles, California, Thursday, March 21, 1946.  
10 a. m.

\* \* \*

The Court: Primarily, of course, the point to which Mr. Warne has directed his argument I think is covered by the record. The plaintiffs in the amended complaint, and I believe in the original complaint with the single plaintiff, in allegation IX allege as follows, and this is a verified complaint, verified by one of the plaintiffs, Mr. Finley himself:

"IX. Plaintiffs, in order to enforce their rights against the defendants, have employed the services of Messrs. Desser, Rau & Christensen, a firm of attorneys in the City of Los Angeles, State of California, the members of whom are all licensed and authorized to practice before the District Courts of the United States, and under the laws of the United States, to-wit, Section 7 of the Sherman Act, plaintiffs are entitled to recover from defendants a reasonable attorneys' fees, and that reasonable attorneys' fees in this action is the sum of One Hundred Thousand Dollars (\$100,000.00)."

As I say, that is verified by one of the plaintiffs. I may say parenthetically, but seriously, that that is rather [2] an unusually generous allegation for a client to make concerning the value of his lawyers' services.

The petition of counsel, it seems to me, is the more authoritative memorial as to the value of the professional

services. I believe it is in the record that Mr. Finley was not a lawyer. I am not sure, but it seems to me that some one asked him that question in the case.

Mr. Warne: I will stipulate he is not; at least, that he has not been admitted to practice before this court.

Mr. Christensen: I will so stipulate.

The Court: So his statement as to the value of attorneys' fees does not come with the same weight of credibility that a lawyer's testimony would come.

Mr. Warne: May I offer the suggestion there, your Honor: My thought was not with reference to Mr. Finley making a representation to the court. My thought was that any showing in support of it would have been manifestly the showing of counsel. But I do say, and my thought there was, it should be upon a petition; just like in a probate case it would be the petition of the executor to make a petition for payment of his attorneys' fees. I had made the point in the objections, and I felt it only fair to call your Honor's attention to the form of it, inasmuch as we are making a record in the case.

The Court: Even assuming that that would be the position, [3] it strikes me that the amended complaint, and I think the original complaint also, would be tantamount to a petition, because the prayer of the complaint, after alleging that the reasonable value of the professional services to be rendered in the case would be \$100,000.00, is, and the plaintiffs themselves petition, as follows:

"Wherefore, plaintiffs pray judgment against the defendants, and each of them, for the sum of One Million Dollars (\$1,000,000.00) as damages, and that said sum be trebled in accordance with the provisions of Section



7 of the Act of July 2, 1890, 26 Stat. 209; for reasonable attorneys' fees in the sum of One Hundred Thousand Dollars (\$100,000.00); and for costs of suit herein incurred."

I think that is a petition, even assuming that the petition should be made by the plaintiff in the case, by the person in whom is represented the right to commence the suit under the Sherman Anti-trust Act and these other co-operative statutes of the United States with respect to alleging anti-trust activities. So that I think so far as the technical aspects of the matter of the petition coming from the plaintiff is concerned, the plaintiff could not tell us anything further. He said he thought the fees would be reasonably estimated at \$100,000.00. I suppose he estimated that upon [4] what he thought he should recover, to-wit, \$1,000,000.00. Apparently, the jury didn't think he was entitled to recover \$1,000,000.00. They thought he was entitled to recover \$18,500.00, and that under the provisions of the law, not dependent upon evidence, but a mandatory provision in the statute itself, it is the duty of the court to treble that in the judgment. For that reason, on the first phase of the argument, I think there is little merit.

This question of fees, attorneys' fees, is not an easy problem. There are certain guide posts, standards, norms, that have been set up, but even they are variable according to the circumstances of each case.

I am not in agreement with counsel for the defendants that professional legal services can be estimated in the same way, for instance, as for certified public accountants' services. While there is, of course, great technical skill required in many auditing matters, there is also a good



deal of pure mathematics in those matters, purely clerical, or at least mathematical services. Of course, mathematics takes the trained mind, but it isn't the same kind of skill that a lawyer must use in presenting a contested case.

I think there are three or four elements which have been pretty well established by the decisions, the authoritative decisions in the Federal Court. One, and primarily, of course, is the skill that is required in the case. If it is [5] a case in which a lawyer commences a suit, say, on a promissory note, where there is no dispute except perhaps a dilatory plea to delay payment, why, there isn't much skill required there. The pleading is simple, the law is settled, it is a negotiable instrument, it hasn't been paid, it is due, and that is all there is to it. The payee or endorsee is entitled to a judgment for the money. But when you get into the realm of federal cases, and particularly those relating to anti-trust cases, you delve into one of the most intricate branches of federal jurisprudence. The novelty of this case I think illustrates that. This case is by no means a settled case in the sense that all of the principles of the case have been previously adjudicated by the Supreme Court of the United States. We think they have, but that is merely our conception of it. There isn't any guiding star by the Supreme Court that touches the case precisely. So the lawyer in preparing such a case, especially where he is representing a plaintiff, is required to use his skill, not only so far as logic is concerned, but his professional skill in his acquaintance with and familiarity with the decisions of the Federal Courts in these anti-trust cases, and in an effort to bring his case

within the scope of the decisions of the Supreme Court of the United States. That is involved in every one of these cases, and it is more difficult, I think, in a private action, authorized under the provisions of the Sherman Anti- [6] trust Act, than it is in a public case. The government counsel who proceeds against an enterprise under the Sherman Anti-trust Act has considerable in his favor, if he is careful, and they usually are careful. He has the economy of the nation, and if it is brought during times of emergency, he has the environment in which that action proceeds; whereas, where a private litigant is seeking to recover against his competitor or against some one he claims is inhibiting him from engaging in free enterprise, there is the selfish interest that is in the case, and it does affect the environment. I don't think it affects the court consciously, but it does affect the environment of the case and presents a more difficult problem for the lawyer who is seeking to recover the judgment than where the public government attorney is seeking generally to recover an injunction, and sometimes damages also.

Now, the amount of time that is spent, especially where there is a conspiracy alleged as there was in this case, in the conferences that occur between the attorney and his client or clients and others who will be material witnesses, consumes a good deal of time. The voluminous file here indicates the amount of time, and the defendants' counsel kept counsel busy, so far as the application of professional skill was concerned, to get the case into the court so that it could be tried. Counsel on the other side were able, as [7] Mr. Christensen has properly said. They were all experienced lawyers, of eminent

standing at the bar. One of them particularly had been government counsel in anti-trust cases, and all of the others were men of experience and learning, so that that was the contest that faced the plaintiffs' counsel, and it wasn't any mean controversy.

The length of time that is taken is another element. I don't mean to say that we can estimate fees entirely upon the amount of time that the lawyer consumes in performing his services. We have to take the temperament of individuals into consideration to some extent, but not to the entire extent. Some lawyers are deliberate, and I may say slow sometimes, whereas others are more mentally alert. I don't mean to say that because they are mentally alert that they have any more ability. Many times they have a great deal less ability. It takes the man of slow processes more time to present the true situation and to meet his opponents' force than it does the man who is alert in advocacy. Of course, we have to take the question of alertness into consideration. And I suppose in this day of rapidity, of alacrity and celerity that we also have to take that into consideration. But I do not mean to say that we can evaluate professional services entirely by the amount of time that is spent. By observing it here in court during the trial, thirteen days of trial, and previously in the arguments, I [8] think that plaintiff's counsel as a whole have shown alacrity and have shown that they were not possessed of that extreme deliberative quality that wastes time in a trial.

The trial of a case is an important feature. In my judgment it is one of the most important features where a controversy is not settled by amicable adjustment, and that is where the lawyer's skill is most clearly demon-

strated. I think this type of case, especially where it is a jury case, is the type of case where the lawyer's skill should be compensated, I may say, with some liberality. There are not only the skillful attitudes that are required, but there is also the human feature. You were dealing with twelve lay persons who are all circumspect and who are all intelligent. This jury was, I think, a characteristic Federal Court jury, composed of men and women of intelligence and conscientious application to duty, and assiduity, so that you are coping with persons whose intellectual plane is superior, and it requires, especially where his opponents are of the type that Mr. Warne and his associates were, a good deal of acumen and a good deal of skill, and no little amount of tact and other qualities that require sometimes a good deal of self-restraint.

Then the final matter, of course, is the benefit to his client. Now, "benefit" is not entirely measured by pecuniary aggrandizement. Where we enter the realm of business, we [9] have the feature of good will, of credit status, and of those other elements in commercial activity which are not always estimated by money. But money is a feature in the case, and the recovery here was really \$18,500.00. I think that in estimating the fee that it is not proper to include something which the law fixes itself. The skill, of course, is there, to get the initial recovery, because unless there is some recovery there would be no trebling of the recovery, and so you can't say that the treble feature should not enter into the picture at all. It should enter in some, but it cannot enter into the picture the same as if the finding of the jury, for instance, had been, exclusive of the statutory trebling of the matter, \$55,500.00. So the recovery, I think, is a recovery of \$18,500.00.



I should say one thing more on the matter of what is called junior counsel in the petition. Where you have a firm, as the plaintiffs' counsel is in this case, there are three names in the firm and I suppose those are the three senior members of the firm. Now, of course, we have had before us here two other young lawyers who actively participated in the case. But I do not believe that we can safely estimate a fee on the number of individuals who comprise a firm. Some of these modern law firms have fifty members. If you start to estimate a fee because of the numerical classification of the firm, they may be opposed in a hotly contested, [10] involved case by one man, and I don't believe that the one man may be entitled to a greater fee for his services because he has to cope with the fifty on the other side, whereas he is alone. You cannot estimate fees for professional legal services upon any basis of that kind, and even though the profession may be getting into a business atmosphere, it is not a business. It is still a profession. It requires personality, intellectual motivation, and it requires certain standards of ethics which are not always applicable in business matters.

If we take all of these matters into consideration, gentlemen, I think that a fee of \$7,500.00 is a reasonable fee to this time and for entry into the judgment. On that basis, if we were going to segregate it, we could take forty days' time at \$100.00 a day and thirteen days' time at \$200.00 a day, which would be \$6,600.00, and then if we add to that approximately \$1,000.00 for additional services, it seems to me that in view of the finding of the jury that that would be a reasonable fee. That will be the amount, \$7,500.00, which will be included in the judgment.



You had better prepare the judgment, Mr. Christensen.

Mr. Christensen: Yes, your Honor.

Mr. Warne: And we will be served with a copy of the formal judgment?

The Court: Yes. You had better collaborate, because [11] we will want to agree on the form of the judgment for the security of all parties.

Mr. Warne: One other matter I would like to suggest to your Honor, and that is this: I request either the court's indulgence at this time or the court's suggestion at this time, or the stipulation of counsel with respect to this matter. It is our present intention to make a motion for a new trial and such other motions as in our opinion are indicated, and in support of those motions—they are not pro forma motions, and this being the first time that the whole record has been before the court, together with the finding of the jury—we desire to present to the court as fully as possible, and I may say very fully, the law which we believe to be applicable and which we believe to be determinative, and in fact, as your Honor has suggested, this case certainly is novel as to its factual aspects, in all particulars practically, and we are of the opinion that the verdict of the jury in this case or in any judgment predicated thereon will not stand.

Now, we want to fairly present that question to your Honor in the first instance. It will be the first opportunity where it can be presented in the form or in the manner which we have here.

What I am about to say is this, that we would like, in addition to the ordinary matter of time, we would like to have [12] a period of time within which to file a brief in support of the motion for new trial and such other motions as are indicated, and I would like an additional 30-day period. Now, in this instance the amount of the judgment is now fixed. Any benefits accruing to plaintiffs will accrue by way of interest on that judgment. The defendant corporation is a solvent corporation, and I submit that it would be of value to the court, and certainly of value to the defendant to have that amount of time.

The Court: What do you say, Mr. Christensen, about the request?

Mr. Christensen: I don't want to be unreasonable at all, your Honor, but it occurs to me that they have had quite a bit of time since the verdict of the jury, and that so far as the preparation of the law is concerned, I think they have done a splendid job of that up to date and it should not require that much more time. That was one of the items they complained of as to our attorneys, the time that it took.

The Court: The court has had the benefit of very voluminous and very erudite briefs from your side of the case, Mr. Warne.

Mr. Warne: May I suggest to your Honor that I believe we shall have one that is not only more erudite, but also more persuasive. But to go back a moment. If I may say this, we have attempted a different approach,

and if I may [13] be granted just a moment, I want to say this: if there is any other field of law, except the law as to unfair competition, where there are so many "trees" and so few, shall we say, standards or signposts or indications of a clear line or clear lines of law, and approaches which the courts have made to this anti-trust law, I have failed to find any other such field except, as I say, the field of unfair competition. We believe the rationale approach, as we say, will not only be more erudite, but perhaps will be a more accurate summarization and outlining and presentation of the law on this subject than has been presented to your Honor before, and I believe it would be of benefit. I mean benefit to the court. I am thinking of it solely in that regard.

The Court: When do you expect to file the motion for the new trial?

Mr. Warne: We will file the motion, your Honor, within the ten-day period. Now, as I say, I would like a period of thirty days' time.

The Court: I think that is really a little too long. I think half of that time ought to be sufficient, and the other side probably may want ten days' time in which to reply.

Mr. Christensen: Yes.

The Court: And then five days' time in which to file your final answer. If you are going to brief it in that [14] way, that would be thirty days all together, which I think ought to be sufficient.

Mr. Christensen: I think so.

Mr. Warne: Now, we would like also, in all probability, to have oral argument on it if your Honor will grant it.

The Court: If we are going to do that, I am going to cut the time on the briefs.

Mr. Warne: That is only as to items—my thought there would not be to argue the law questions which are presented in the briefs. That we would not do.

The Court: I think perhaps I had better establish the rule this way then, that at this time the court will not permit briefs and oral argument, but after the briefs are filed and after the court has had an opportunity to study the briefs, it will then indicate whether there is any point that it desires argued, and if any such appears, it will so notify counsel. Otherwise it will decide the motion on the briefs filed.

Mr. Warne: I can't ask any more than that, because what we want to do is to present the matter. Then if we excite your Honor's interest, and I believe we will, if the court then can be assisted by argument, we want to present it. We don't just want to get up here and make a speech.

The Court: Then we will leave it that way, and the court will determine whether there will be any oral argument in [15] addition to the written briefs, which will be filed within the time stated previously.

[Endored]: Filed April 5, 1946. [16]



[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

\* \* \* \* \*

Los Angeles, California, Friday, June 14, 1946.  
10:00 A. M.

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The Clerk: Case No. 4328-M-Civil, Larry Finley and Miriam Finley v. Music Corporation of America, a corporation, et al.

The Court: Of course, gentlemen, you are all aware of the restricted and limited scope of this hearing, and we are not going to deviate from it, as stated in the order. Proceed.

(Argument on behalf of the plaintiffs by Mr. Jaffe.)

Mr. Doherty: If the court please, Mr. Warne will lead off, and may I follow him?

The Court: Yes. Probably before counsel commences his argument the court should pose one further inquiry, without any indication or suggestion as to the ultimate decision on this one question, and I will not count this on your time, gentlemen.

Mr. Warne: Thank you.

The Court: The court has before it alternative motions: One, a motion to enter a judgment different from that which now exists, notwithstanding the verdict of the jury; and, second, a motion for a new trial.

Assuming that the power of the court is measured by the case of *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, query: Is the court in this action justified in ruling [2] upon the motion in a conditional manner, as



follows: Concluding that there is a paucity of evidence to justify or warrant, under the law, any pecuniary damage to the plaintiffs, is the court thereby precluded in this action from awarding the reasonable attorneys' fees fixed and the costs of suit?

That is the question that is posed. In considering it there are two matters that must be regarded. One is the statute itself, Section 15 of Title 15 of the United States Code, which reads as follows:

"Suits by persons injured; amount of recovery. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

That statute must be read in connection with Rule 54 of the Rules of Civil Procedure, which, as far as is pertinent to the question posed, reads as follows:

"Rule 54. Judgments; Costs.

"(a) Definition; Form. 'Judgment' as used in these rules includes a decree and any order from which [3] an appeal lies. . . ."

There is another sentence which is immaterial.

"(b) Judgment at Various Stages. When more than one claim for relief is presented in an action the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of

the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

Then subdivision (d) of Rule 54, which reads as follows:

"(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . ."

I think that poses the question directly to counsel as to whether if, as and when the court should conclude, in addition [4] to what it has already concluded, as indicated by its partial ruling entered on June 4th, that there is a paucity or an insufficiency of evidence to justify the fixation of any definite amount, or, of any amount of damage, pecuniary damage, suffered by the plaintiffs, whether that would carry with it the provisions of the judgment which is now sought to be vacated as to the attorneys' fees and the costs.

Mr. Doherty: May I make inquiry on one point, your Honor?

The Court: Yes.

Mr. Doherty: Had your Honor in reading the rule in mind the thought that you might award a decree enjoining the defendants from future restraint as to the plaintiffs? What I had in mind is that would help me in answering the court's question as to whether or not there could be an allowance of attorneys' fees and costs.

The Court: The court's mind was not directed to any question of injunction.

Mr. Doherty: That is what I wanted to know; your Honor.

The Court: To answer that question a little more specifically, on reflection, even if the court has the power to do that which the question posed indicates, the other rules with respect to staying execution would, of course, be unaffected.

Mr. Warne: May we, in answering that question or [5] attempting to answer the question which your Honor has posed, be permitted to have some little discussion between our own counsel here in the court room so as to try to assist the court? I have a prima facie reaction, but I am not going to express it at the moment.

The Court: Yes.

(Argument on behalf of the defendants by Mr. Warne.)

(Argument on behalf of the defendants by Mr. Doherty.)

The Court: I will hear the rest this afternoon, gentlemen.

Mr. Warne: If the court please, we have the answer to your Honor's inquiry, I believe. May we present that, too, this afternoon?

The Court: Yes. We are not going to hold you to that hard and fast rule as to time.

Mr. Warne: Your Honor, is the recess until 2:00 o'clock?

The Court: 2:00 o'clock, yes.

(Whereupon, at 12:05 o'clock p. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [6]

Los Angeles, California, Friday, June 14, 1946.  
2:00 P. M.

The Court: Now, gentlemen, we will proceed.

(Further argument by Mr. Doherty.)

(Reply argument by Mr. Jaffe.)

The Court: Gentlemen, that leaves the question which the court posed this morning, I believe.

Mr. Warne: Could we ask, your Honor, that Mr. Reich answer that question?

The Court: Yes.

Mr. Reich: I am very grateful to the court for permitting me to answer that question so as to give me an opportunity to address it.

Your Honor, this is an action at law, and it is not unlike the type of action that Mr. Doherty spoke about, an injury to property, and I hope the court will not mind my giving one example. We will suppose there is a law suit involving the ordinary collision of two automobiles, and the plaintiff goes into court and proves the negligence of the defendant, that he didn't make a signal, either didn't signal or didn't make a stop at a stop sign. He has proved negligence. Then he has got to prove damage to his automobile, and he doesn't have a receipted bill, let us say, or doesn't have an expert testify as to what the car looked like before, or whatever is necessary to prove damages. Then the court [7] throws out the case, saying, "You have proved negligence, but you haven't proved damages." The question is, how does the judgment read? It reads: Judgment for the defendant and costs to the defendant; notwithstanding that the defendant has been guilty of negligence. But damages have to be proved,



and that being a part of the case, the judgment must go for the defendant and costs go to the defendant.

Now, your Honor, I would like to point this out. There are two sections that are important. Not only Section 15 of Title 15, which is the Sherman Act, but Section 26, which is the Clayton Act. The only mention of damages or of counsel fees is on the law side on the question of damages under Section 15. On the equity side, and this case isn't on the equity side, there is no mention at all of any counsel fees.

Incidentally, with respect to Rule 54, the question of claims, if the court may hold on one and withhold on the other, this is a single action at law, and, therefore, if there are no damages on the law side, there can't be any costs and there can't be any counsel fees.

Now, my argument doesn't depend upon the statute alone. There are express cases on the point. I cite first to the court the case of *Clabaugh v. Southern Wholesale Grocers' Ass'n*, 181 Fed. Rep. 706. It is from the Circuit Court, Northern Division of Alabama, and this language which I am [8] about to quote to the court comes from page 706 of that case.

Mr. Doherty: Is that an anti-trust case?

Mr. Reich: Yes, it is under the Sherman Anti-Trust Act:

“ . . . The Act of Congress under which this suit is brought provides for the recovery, not of single damages, but threefold damages; but the construction of that Act by the Supreme Court in the case of *Montague & Co. v. Lowry*, 193 U. S. 38, . . . is to the effect that threefold damages are only recoverable when the plaintiff has a cause of action that would entitle the jury to award



single damages. In other words, the function of the jury is to only render a judgment for actual damages, and the court then triples them; but if there is nothing to go to the jury for single damages, then the court has no jurisdiction to render any judgment for triple damages. And the same is true as to the attorney's fees. I think they are merely an incident to a judgment for the plaintiff. If no such judgment is obtained, then there can be no allowance for attorney's fees, though the settlement was made after this suit was commenced."

Now, that is an early case, and we will go to a later case. I cite to the court *Decorative Stone Co. v. Building Trades Council of Westchester County*, 23 Fed. (2d) 426, in [9] the Second Circuit, in which certiorari was denied by the United States Supreme Court. Mr. Doherty calls my attention to the fine bench that was sitting in that case, Judges Learned Hand, Swan and Augustus N. Hand. As I say, certiorari was denied in the Supreme Court. This was an equity case, and this is the language that the court uses there:

"The allowance of an attorney's fee, as authorized by Section 4"—that is Section 4 of the Sherman Act, of Section 15 of Title 15—"is incidental to the statutory right to damages, and was properly denied in the equity proceedings."

Then we will bring it up even later, your Honor, to the case of *Allen Bradley Co. v. Local Union No. 3*, in the District Court, Southern District of New York, 51 Fed. Supp. 36, dated June 10, 1943. Judge Caffey was sitting, and this case was reversed by the Circuit Court, and, in turn, reversed by the Supreme Court, but on this point of damages there was no reversal, and I read now

from Judge Caffey's decision on page 40 of the Supplement. I don't know if I gave your Honor the dicta page I was reading from.

The Court: 51 Fed. Supp. 86, you said, I believe.

Mr. Reich: It is 51 Fed. Supp. 36.

The Court: Page 36.

Mr. Reich: The language which I was going to read is on page 40. I think, though, that I did not give the court the [10] dicta page in the Decorative case. That is 23 Fed. (2d) 426, and I was reading to the court from page 428.

I am now reading from the Bradley case.

"The treble damage section of the anti-trust laws (15 United States Code Annotated, Section 15) gives to a prevailing plaintiff the right to 'a reasonable attorney's fee.' That relief, restricted to that purpose, is preemptory and is unequivocal. On the other hand, the court cannot properly award it except as an incident to the successful prosecution of a law action for recovery of damages based on a violation of the anti-trust laws. It was so held in . . .", and then they cite the cases which I have already cited to the court, the Clabaugh case and the Decorative Stone case.

In other words, a part of the plaintiffs' case here is not only proving conspiracy, but proving certain damages, and if there are no damages, plaintiff has not maintained its case and judgment must be for the defendant, and if judgment is for the defendant, the costs must be for the defendant and, of course, no counsel fees to the plaintiff.

Now, your Honor, I wonder if I could say something further. I felt a little frustrated as I was sitting here

and listening to Mr. Jaffe, and I wonder if the Court would indulge [11] me in going beyond the inquiry which the court made of me.

The Court: I don't think I should do that. The argument has been very complete on both sides. You haven't discussed the effect of the rule which I read to you this morning.

Mr. Reich: I thought I had, your Honor.

The Court: This matter of costs under the new rules is not a peremptory matter ordinarily, and in law actions, so-called, the distinction between a law action and a suit in equity, in so far as the applicable rules of procedure in the Federal Courts are concerned, has been eliminated. Ordinarily, under the old process, in an action at law, if successful, costs would follow as a matter of course. That isn't the rule any more. Costs are in the discretion of the court in every case, a very salutary innovation in the trial of cases in the Federal Court. That is the thought the court had in mind, gentlemen, on the question.

Mr. Warne: May we inquire as to that rule number again, your Honor? Was it 54?

The Court: Rule 54, I think it is. The theory of the new rules, broadly speaking, is to afford a more adequate determination of litigation than had existed theretofore, to get away from the rigidity of procedural rules which defeated justice in many cases. So that the scheme of the new rules was to enlarge remedies and the procedural elements going to the administration of remedies. [12]

Now, if a law suit involves two parts, and I am not speaking now of actions purely in tort, such as actions for personal injuries, actions for damages for personal injuries, but I am speaking directly with respect to ac-

tions under the anti-trust laws of the United States, there are two phases to those laws, and I am referring, of course, to the private suit authorized by Section 23 of Title 15 of the Code. One is the interstate feature, coupled with the feature of commerce, the interstate commerce feature. The other is the damages that flow by reason of the injury that one suffers in his business or property because of the doing of anything forbidden in the anti-trust laws, the statute providing that such an injured person may maintain the suit.

In this case there was no certainty until the trial ensued, and until it was terminated, as to whether or not there would be any adequate evidence tending to show damage. The court appreciates what Mr. Warne very vigorously argued that from the inception of the case the position of the defendants has been that no damages could be proven. The court's rulings throughout those earlier proceedings were predicated upon the fact that that could not be ascertained until the trial took place. Under this specialized legislation concerning monopolies and conspiracies in restraint of trade, there was no way in which that question could be determined properly until the case was tried. I think that is illustrated by the decision [13] of the Supreme Court in the second *Foster & Kleistner* case, the case of *Stevens v. Foster & Kleistner*, where the Supreme Court reversed a ruling dismissing that case, and used language which was very broad, and, in my judgment, very significant and comprehensive concerning the duties of courts in these anti-trust cases. So until the case was tried and until the evidence revealed what the situation was with respect to the plaintiff's injury in his business, or injury to his property, there was no way



in which this matter of assessing in a pecuniary way that injury could be ascertained.

Now, these suits require skill in their presentation. A man can't come into the Federal Court and try an anti-trust case unless he is a lawyer. It is a highly technical and specialized field of litigation. How does he get a lawyer? I am talking now about the philosophy of this Act. I am not talking about any particular case, but I am talking about the philosophy of this law. If he is a large concern, it is an easy matter, and he can get a lawyer. But this law is designed to protect the one who is not a large concern, but one who is injured by reason of the magnitude of business, and its consolidation into enlarged activities. The only way he can get a lawyer is for him to do what is generally done. I don't know whether it was done in this case or not, and I am not speaking at this time particularly of this precise, concrete case. I am speaking as to the philosophy of this [14] law, so as to ascertain what is the correct rule to be applied in the case under the new rules of civil procedure. Before that point is reached in the trial of a case, there must be a great deal of work done in the court room; and there must be a great deal of work done out of the court room, as there was in this case. If it could be definitely known that there was no way in which a suitor who claimed to have been injured in his business or property could have that injury estimated by monetary standards, then I can see how the very purpose of the law would be defeated at the trial of the case if perchance the judgment of the court was that the proof, under the authorities, was not sufficient to permit to stand the award of damages made by the jury. I can understand in a situation of that kind where the court would send the injured



party out empty-handed and would require that party to pay the costs of the proceeding. This statute—I read it this morning, and it bears rereading on that point—states:

“Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, [15] including a reasonable attorney’s fee.”

The feature of the statute with respect to the right to recover damages has the conditional clause “by him sustained.” That isn’t at the end of the paragraph. It says he “shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.”

The thought the court had in mind was that if the modern and the proper interpretation is to be given to the anti-trust laws, so as to make them effective and so as to provide the remedies which Congress had in mind when it enacted them, and which the courts have had in mind progressively since the enactment, it should frame its judgments—under the new rules of civil procedure which permit the framing of judgments in that manner—to accomplish what the court thinks should be accomplished in the case.

The court has expressed itself repeatedly in this case, and did so by giving the case to the jury, and has found no reason to modify its judgment, as it stated in its order of June 4th,—notwithstanding the able briefs and able arguments of counsel has found no reason to modify its

judgment with respect to the interstate character of the Music Corporation of America, or as to the commercial aspect of the enterprise that it was actuating, and feeling that way, it was its duty to submit the matter to the jury for proper assessment of damages. [16]

These cases that counsel has cited here throw some light on it. I am going to read them a little more thoroughly, but unless they are clearly determinative, it is the court's view that it should frame a judgment in this case notwithstanding the verdict that will accomplish what the court thinks should be accomplished in this case.

Mr. Warne: May I make an observation in connection with your Honor's reasoning in so far as this aspect of the case goes, that is, this costs and attorney's fee aspect?

First, when your Honor reads these cases and again cogitates on the law, I think he should keep in mind that Congress enacted the statute, that it was enacted especially by lawyers, that it passed the judiciary committee, passed the Senate of the Congress, the two houses of Congress. Now, what did Congress have in mind when that statute was enacted? Did it have in mind that a judge, a trier of the facts in a law case—and this is cast in the language of law, as your Honor will note, of actions where judgments at law are rendered—did the Congress have in mind a kind of limited equity jurisdiction granted to a trial court in an instance such as this, where the plaintiff does not prevail and does not show after a lengthy trial and the utmost consideration of the case that he suffered any damages under the statute, and damages which [17] are at all recoverable? I say that your Honor cannot find and cannot hold that there is granted by the rule, by Rule 54, any right to reach into

our pockets, the pockets of a defendant for whom a judgment is rendered, and say, "You have to pay the costs of an attorney to prosecute this action against you in which he could not recover a judgment. You have to pay the costs of a plaintiff who wants to prosecute a worthless action." I say "worthless" in the sense that he might have been aggrieved, and he might have brought an action by way of an injunction in which he would not have been permitted to recover any attorney's fees.

Now, I say that your Honor cannot read into the rules, nor into the statute, any equitable right to reach into our pockets and say, "You have to pay Messrs. Desser, Rau & Christensen." I say that is not permitted, and I say that by the express language of these rules and the statute, the anti-trust statute itself, giving rise to the cause of action, that there is no jurisdiction on the part of your Honor, and no place is there power given to the court to assess any attorney's fees.

Mr. Reich: I was going to say, your Honor, as to what Mr. Warne has said, that the case of Decorative Stone Company had before it the very arguments which he has made.

The Court: I am going to read the cases.

Mr. Reich: I would like to also point out to the court— [18]

The Court: We didn't find these cases before.

Mr. Reich: May I make just one other comment. and call attention to another important phrase in that section, and that is, "any person who shall be injured in his business." If your Honor holds that no damages have been shown in this case, then the plaintiff has not been injured in its business. It says, "any person who shall

be injured in its business," and that phrase, to my mind, is just as conclusive as the others.

The Court: Let me suggest another reason to you, gentlemen, why the argument may have some force. This may not be a strictly legal reason, but it is a very effectual one in respect to this type of law. The government should prosecute these cases. I don't think there is any doubt about that. But when we speak of the government we mean, in the prosecution of anti-trust cases, the particular administration that happens to be in power. Now, what is the intention of Congress in passing laws at this time, and what is the philosophy of those laws? That is what I am talking about. The philosophy of the law is to prevent combinations that restrain trade and that stifle competition and that destroy initiative and free enterprise. That is the basic generic foundation of these laws.

Now, suppose that the government does not want to prosecute, does not want to commence the suit. What remedy has the [19] person who is injured in his business? He hasn't any at all. He is just simply told that it is too bad—and I am not speaking now of this particular case, and, again, I am speaking of the philosophy of the law—it is all right for people to combine and to control industry for commerce in entertainment, or in any other field of human activity, if you can get enough together and have the capital to do it; that is all right. He is told the Congress didn't mean that; it only meant if the government felt like prosecuting, why, the fellow who was injured could also prosecute.

Of course, that is not what these laws mean at all, and I don't think the courts have construed them to that end.



The courts have been very liberal in these cases. They haven't reached into anybody's pocket to pay something to somebody, but they have endeavored to construe these laws so as to effectuate the purposes of the law.

Now, we know we have to look at this realistically. As Judge Cardoza said in that case which was decided in New York, a wonderfully illuminating case I think, you have to look at litigation realistically. Lawyers, like other people, are in the environment of a profit scheme. We haven't yet transformed our scheme of life into anything but a profit scheme. That is the basis of free enterprise under the Constitution. Lawyers can't work without profit. Sometimes they are able to, but it does not happen very often. They [20] have to move and have their being the same as other people do.

Now, I am going to read these cases. I didn't know that there were any cases on this point.

Mr. Warne: May I offer an observation on this last point, your Honor?

The Court: Yes.

Mr. Warne: — because you were getting away from the straight law points that have been raised before, and a part of our — I won't say "struggle," but a part of our work has been in, in effect, wrestling with an expanding concept.

Now, I want to say this with reference to this matter of the lawyer and what a man who is aggrieved has to do. I say that he has to hire a lawyer. That is the first thing to be done. Now it happens we are in the law business, and suppose it happens that we are consulted with reference to anti-trust cases, and it happens that we have one in preparation now with reference to a plaintiff's case.



We have had such matters submitted to us before, and we have rendered opinions and advice to a man that he hasn't had a cause of action for various reasons. I dare say that every one has had that experience.

Now, Congress has provided the means and the mechanics for the protection of the interests of the public, including the interests of a private man who happens to be aggrieved, [21] and he is in no different position than a man who is hurt in a traffic accident and has a cause of action and goes to a lawyer and retains him, and if he has a case upon which a recovery can be had, the lawyer takes the case on a contingent basis and either wins or loses.

I submit that your Honor must look here, shall I say, not to any expanding position of the judiciary, in so far as the rights of the court are concerned or the protection of an aggrieved party is concerned, but I say that in that instance the man must consult a lawyer and come into court and prosecute his action. I say that this rule 54 under no instance can be construed as giving to a trial court any jurisdiction beyond the plain meaning of the statute, the anti-trust law.

Now, there are instances where a prevailing party does not recover his costs, but that is an entirely different thing than saying that a party who does not prevail is entitled to recover his costs and attorney's fees, and the statute must be read in that light.

The Court: Of course, if the trial court can't do it, the upper court can't do it.

Mr. Warne: I know.

The Court: You seemed to emphasize the trial court feature.

Now, this is an answer and this will terminate it, because I am getting into advocacy instead of deciding questions, and I don't want to do that. There is a temptation to do it when we have able counsel here on both sides.

The new rules changed the entire old scheme. This business of costs following decisions is no longer the rule. Why? Because of the very factor that I am trying to emphasize, that the courts got tied up with procedural difficulties that disabled the judicial agency of the government to function in a way that would administer justice, so far as it can be administered in human forums, and thereby dissuaded people from asserting their rights because they would be mulcted in costs, and it left to the trial court, left to the trial judge, the right to say whether or not costs should be allowed in any case at all, excepting in a case where the statute said, where Congress said that costs would follow, as a matter of course, the trial court's hands were tied, but they haven't been tied here.

As I say, gentlemen, I want to read these cases, and will do so.

The motion will be submitted, gentlemen.

[Endorsed]: Filed 5, 1946. [23]

[Endorsed]: No. 11483. United States Circuit Court of Appeals for the Ninth Circuit. Larry Finley and Miriam Finley, Appellants, vs. Music Corporation of America, a corporation, H. E. Bishop and Lawrence Barnett, Appellees, and Music Corporation of America, a corporation, H. E. Bishop and Lawrence Barnett, Appellants, vs. Larry Finley and Miriam Finley, Appellees.

Transcript of Record. Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed November 22, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR PRINTING

To Paul P. O'Brien, Esq., Clerk of the Above Entitled Court:

This will advise you that the appellants, Music Corporation of America, H. E. Bishop and Lawrence Barnett, desire the record certified by you to be printed in its entirety.

Dated: November 29th, 1946.

PACHT, PELTON, WARNE, ROSS  
& BERNHARD

By Clore Warne

Attorneys for Said Appellants

[Endorsed]: Filed Dec. 3, 1946. Paul P. O'Brien,  
Clerk.

In the Circuit Court of Appeals of the United States  
in and for the Ninth Circuit  
No. 11,483

LARRY FINLEY and MIRIAM FINLEY,  
Appellants,

vs.

MUSIC CORPORATION OF AMERICA, a Delaware  
corporation, et al.,  
Appellee.

STATEMENT OF POINTS AND DESIGNATION  
OF RECORD

STATEMENT OF POINTS ON WHICH APPEL-  
LANTS LARRY FINLEY AND MIRIAM FIN-  
LEY INTEND TO RELY ON APPEAL

1. That the trial court erred in granting defendants' motion for judgment notwithstanding the verdict of the jury on the issue of monetary damages awarded to said Larry Finley and Miriam Finley, plaintiffs, by the jury in its verdict.

2. Appellants designate for printing the entire certified transcript, by stipulation of counsel.

Dated: At Los Angeles, California, this 14th day of December, 1946.

DESSER, RAU & CHRISTENSEN  
By Wm. Christensen  
Attorneys for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 16, 1946. Paul P. O'Brien,  
Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' MUSIC CORP. OF AMERICA,  
ET AL., STATEMENT OF POINTS AND  
DESIGNATION OF RECORD

To Paul P. O'Brien, Esq., Clerk of the Above Entitled  
Court; and to Larry Finley and Miriam Finley and  
to Desser, Rau & Christensen, Their Attorneys:

STATEMENT OF POINTS

The following is a statement of the points upon which  
appellants intend to rely on the appeal herein:

1) The trial court erred in making its order and  
judgment entered June 24, 1946, herewith appealed from,  
by including therein certain language and by making its  
judgment or order in the following language:

"that there is ample and substantial evidence to sup-  
port and sustain the implied finding of the jury that  
the defendants have conspired to restrain interstate  
commerce and to monopolize interstate commerce in  
that portion of the business of musical entertainment  
involving bands, orchestras, and attractions furnish-  
ing dance music at places of public entertainment,"

and together with the following part of said order and  
judgment, to wit:

"And, Accordingly, judgment is ordered for the  
plaintiffs, Larry Finley and Miriam Finley, upon all  
the issues herein, except damages per se, and also  
for their costs in the sum of \$1592.85, and the fur-  
ther sum of \$7500.00 reasonable attorneys' fees, also  
as part of their costs herein, making in all the sum  
of \$9092.85 as their total costs of suits."



2) The trial court erred in making its order and judgment of June 24, 1946, whereby it granted defendants' motions for judgment notwithstanding the verdict of the jury.

3) The trial court erred in making its order and judgment of June 24, 1946, and in ruling on defendants' motion notwithstanding the verdict and for a new trial by denying said defendants' motion for a new trial.

4) The trial court erred by making its order appealed from, dated and filed August 8, 1946, which denied and refused said defendants' motion to re-assess and re-tax costs and said defendants' motion to reform and modify the court's order and judgment of June 24, 1946, and to grant judgment for the defendants.

### DESIGNATION OF RECORD

Appellants designate for printing in the record on the appeal the complete record and exhibits in the action.

Dated: December 17th, 1946.

PACHT, PELTON, WARNE, ROSS  
& BERNHARD

By Clore Warne

Attorneys for Appellants

[Endorsed]: Filed Dec. 20, 1946. Paul P. O'Brien,  
Clerk.